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# In the Supreme Court of the United States

OCTOBER TERM, 1984

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THEODORE CLEAVINGER, MARVIN MARCADIS, AND TOM P. LOCKETT, PETITIONERS

*v.*

DAVID SAXNER AND ALFRED CAIN, JR.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED

Whether members of an Institution Discipline Committee, who adjudicate cases in which prison inmates are charged with rules infractions, are entitled to absolute immunity from personal damages liability for actions taken in that quasi-judicial capacity.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

---

The Solicitor General, on behalf of Theodore Cleavinger, Marvin Marcadis, and Tom P. Lockett, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 727 F.2d 669. The opinion of the district court denying petitioners' motion for judgment notwithstanding the verdict (App., *infra*, 27a-34a) is unreported.

## JURISDICTION

The judgment of the court of appeals (App., *infra*, 35a) was entered on February 13, 1984. A petition for rehearing was denied on June 8, 1984 (App., *infra*, 36a). On August 27, 1984, Justice Stevens extended the

time for filing a petition for a writ of certiorari to and including November 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In January 1975, prisoners in the federal correctional institution at Terre Haute, Indiana, engaged in a two-day strike to protest an inmate's death in the prison hospital (App., *infra*, 2a). On February 14, 1975, respondents, who were inmates at Terre Haute, were cited in separate incident reports with encouraging other prisoners to engage in another work stoppage (*id.* at 3a; PX 5, 12).[1] The following day, each respondent received a copy of the incident report as required by the Bureau of Prisons Policy Statement 7400.5C (Oct. 4, 1974) [hereinafter cited as BOP Policy Statement] (App., *infra*, 3a; PX 5, 7, 12). In accordance with Bureau of Prisons practice, respondent Saxner was given and signed a notice explaining his rights at the disciplinary hearing to be held before the Institution Discipline Committee (IDC).[2] These rights included the right to advance written notice of the charge, the right to be represented by a staff member of his choice, and the right, except where institutional safety would be impaired, to attend the hearing, to present testimony and documentary evidence, and to receive a written explanation of the IDC's decision. App., *infra*, 3a; PX 6. Following issuance of the incident reports, respondents were placed in administrative segregation (*ibid.*).[3]

Respondent Saxner appeared before the IDC on February 21, 1975. On that day, the IDC was composed of

[1] "PX" stands for plaintiffs' exhibit.

[2] The record does not reflect whether respondent Cain received a similar notice at that time (App., *infra*, 3a).

[3] Administrative segregation results in a prisoner's removal from the general inmate population for a temporary period (2 Tr. 226; 28 C.F.R. 541.20).



petitioner Cleavinger, an associate warden; petitioner Marcadis, a correctional supervisor; and petitioner Lockett, chief of case management. App., *infra*, 3a.[4] Saxner was accompanied by a staff counselor, Ralph Smith, who represented him at the hearing. After reading the charge and reviewing Saxner's rights, the IDC introduced the incident report and three documents found in Saxner's cell. The first document (PX 4) was a cover letter from Saxner to Arpiar Saunders of the National Prison Project acknowledging that Saxner had written an enclosed "press release" entitled "Prisoners at Terre Haute Seek An Investigation" (PX 1). Among other things, the press release advocated administrative approval of a prisoner's union and amnesty for those who had participated in the strike. The letter also requested that Saunders keep an "important" enclosed memo entitled "Ideals and Proposals of the Prisoner Labor Union" (PX 14). At the hearing, Saxner admitted that he had written the press release and had mailed it to persons outside the prison without authorization. Exh. N to Complaint 3-4. No guards or inmates were called as witnesses, but Saxner was permitted to testify on his own behalf and to introduce affidavits of several inmates. App., *infra*, 3a. The IDC denied Saxner's request to permit certain inmates to testify that he had not encouraged them to stop working, because their testimony would have been cumulative (*id.* at 3a n.4).[5]

[4] IDCs at Terre Haute were generally composed of three members. By regulation, at least two of these members were senior correctional officers with a rank of department head or higher. The third member was normally a less senior member of the correctional staff. Staff members who witnessed the incident were excluded from membership on the IDC unless application of that rule would preclude the impanelling of an IDC (App., *infra*, 3a n.3; PX 7, ¶ 4; see 28 C.F.R. 541.16(b)).

[5] Compare *Real* v. *Superintendent, Massachusetts Correctional Institution*, 390 Mass. 399, 456 N.E.2d 1111 (1983) (due process requires support in record of prison disciplinary pro-

After adjourning and considering the evidence, the IDC found respondent Saxner guilty of encouraging a work stoppage, in violation of prison rule 255 (BOP Policy Statement 6). In addition, based upon the documents found in Saxner's cell and his admissions at the hearing, Saxner was also found guilty of unauthorized use of the mail, in violation of rule 701 (BOP Policy Statement 6), and possession of contraband (*i.e.*, inflammatory material advocating an illegal prison union), in violation of rule 208 (BOP Policy Statement 5). The IDC ordered that Saxner be placed in administrative detention and forfeit 84 days of "good time" and recommended his transfer to another institution. App., *infra*, 4a; Exh. N to Complaint.

Respondent Cain's IDC hearing occurred the same day before the same officers (App., *infra*, 4a). He was represented at the hearing by staff representative J.R. Alvarado (PX 13). The IDC advised Cain of his rights and then produced the incident report, which contained the particulars of the work stoppage charge. Two documents found in Cain's cell—Saxner's letter to Saunders and the manuscript "Ideals and Proposals of the Prisoner Labor Union"—were also introduced. App., *infra*, 4a; PX 14. Cain testified and denied that he had encouraged other inmates not to work. He also demanded the opportunity to cross-examine his accusers. 1 Tr. 102, 104, 105. No other witnesses were called. At the conclusion of the hearing, the IDC found Cain guilty of encouraging a work stoppage and of possessing contraband, *i.e.*, "inflammatory material * * * supporting disruptive conduct in the institution." App., *infra*, 4a; PX 13. The IDC ordered that Cain be confined in administrative segregation and forfeit 96 days of good time and recommended his transfer to another institution. *Ibid.*

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ceeding for denial of prisoner's request to call witnesses), cert. granted *sub nom. Ponte* v. *Real*, No. 83-1329 (Oct. 1, 1984).



2. In accordance with the BOP Policy Statement (PX 7, ¶ 10; see 28 C.F.R. 541.19), each respondent was informed of his appeal rights at the conclusion of the IDC hearing. Respondents appealed the IDC decisions to the warden, who provided virtually all of the relief they requested. The warden ordered respondents' release from administrative segregation, restored the forfeited good time, and directed that respondents' records carry a notation that the incident should not adversely affect their consideration for parole. He refused, however, to expunge their records (App., *infra*, 4a; 1 Tr. 61, 62, 123; PX 10, 15).

Respondents appealed this one adverse ruling to the Regional Director of the Bureau of Prisons, and based upon the Regional Office's recommendation, the records of both respondents were expunged. App., *infra*, 4a-5a. Respondent Saxner was granted parole in April 1975; respondent Cain was paroled in June 1975 (1 Tr. 63, 125).

3. Meanwhile, in March 1975, respondents had brought suit in the United States District Court for the Southern District of Indiana against petitioners and other prison officials in their individual capacities.[6] Respondents' complaint, as amended, alleged that the defendants had violated respondents' rights under the First, Fourth, Sixth, and Eighth Amendments. Respondents sought declaratory and injunctive relief and a total of $75,000 in compensatory damages. App., *infra*, 5a.

Prior to trial, the district court granted petitioners' motion to dismiss the complaint on the ground that their function as IDC hearing officers entitled them to absolute immunity. Nearly two years later, however, the court reinstated the suit in light of the Seventh Cir-

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[6] Also named as defendants were the warden (Charles Benson) and the administrative supervisor (C.D. Wilson). App., *infra*, 3a n.3.

cuit's decision in *Mary & Crystal* v. *Ramsden*, 635 F.2d 590 (1980), which held that members of a disciplinary committee at a state juvenile facility were entitled to only qualified immunity. App., *infra*, 5a.

After reinstatement of the complaint, the case was tried to a jury in April 1981. In response to special interrogatories, the jury found that petitioners had violated respondents' Fifth Amendment due process rights (App., *infra*, 5a).[7] The jury awarded each respondent $4500 as compensatory damages (*ibid.*; 2 R. 370-374).

The district court denied petitioners' motion for judgment notwithstanding the verdict (App., *infra*, 27a-34a). The court appears to have found (*id.* at 29a-30a) that respondents' due process rights had been violated because (1) respondents were not given advance notice of some of the charges, (2) respondents were not allowed to call certain witnesses, and (3) the IDC relied on hearsay in support of the charges. Petitioners appealed on the grounds that they were entitled to absolute immunity and, in the alternative, that the verdicts were excessive.

4. The court of appeals affirmed by a divided vote (App., *infra*, 1a-26a). The majority opinion, written by Judge Wood and joined by Judge Cudahy, held (App., *infra*, 1a-2a) that petitioners' claim of absolute immunity was foreclosed by prior Seventh Circuit decisions denying such immunity to state correctional officers serving in a similar capacity. See *Redding* v. *Fairman*, 717 F.2d 1105, 1117 (1983); *Chavis* v. *Rowe*, 643 F.2d 1281, 1288, cert. denied, 454 U.S. 907 (1981); *Mary & Crystal* v. *Ramsden*, *supra*.[8]

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[7] Judgment was entered in favor of the other defendants (see note 6, *supra*; 2 R. 370-374). Respondents did not contest this aspect of the judgment on appeal.

[8] The court also stated (App., *infra*, 7a) that the damages awards might be "somewhat excessive," but it refused to disturb them.



Judge Celebrezze, sitting by designation, dissented. In his view, the court of appeals failed to follow this Court's analysis of the absolute immunity issue in *Butz* v. *Economou*, 438 U.S. 478 (1978). Under *Economou*, Judge Celebrezze contended, an official is entitled to absolute immunity if (1) his decisions are "functionally comparable" to those of a judge, (2) the controversies he resolves are "sufficiently intense to spawn harassing or intimidating litigation," and (3) "the adjudicatory process over which the official presides contains sufficient safeguards to lessen the 'need for individual suits to correct constitutional error'" (App., *infra*, 18a-19a (footnote omitted), quoting *Economou*, 438 U.S. at 512).

IDC members, Judge Celebrezze maintained, meet all of these requirements. He noted (App., *infra*, 22a) that they perform "the classic judicial function" of "determin[ing] whether an accused person is guilty or innocent of the charges brought against him." He also pointed out (*id.* at 23a) that IDC members face a severe threat of harassing or intimidating litigation, since "[t]he ability of prisoners to generate litigation is substantial and well documented." Finally, he argued (*ibid.*) that IDC procedures are sufficiently formal to assure that any constitutional error will either be corrected in the course of the proceeding, or avoided entirely.

In response to Judge Celebrezze's dissent, the majority opinion stated (App., *infra*, 2a n.2) that it "recognize[d] and respect[ed]" his "thoughtful contrary analysis" and added: "His arguments suggest that in due time the issue may merit reconsideration in this circuit." In view of this statement in the majority opinion, Judge Cudahy wrote a concurring opinion in support of the prior Seventh Circuit decisions (App., *infra*, 10a-16a). Judge Cudahy maintained (*id.* at 10a) that the activities and procedures of the IDC officers are "so

dissimilar in form and substance from those of judges granted absolute immunity that reliance on an all-encompassing similarity of quasi-judicial function will not wash." He also argued (*id.* at 14a-15a) that "[i]t would be poor policy to extend absolute immunity to these defendants" because "they are accorded adequate protection against harassment by the enlarged safeguards of qualified immunity as announced in *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)]."

Petitioners' request for rehearing en banc was denied, with four of the nine active judges voting for en banc review. App., *infra*, 36a.

**REASONS FOR GRANTING THE PETITION**

This case presents an important and frequently recurring question concerning the personal liability of correctional officials who sit on bodies that adjudicate prison disciplinary cases. Without applying the functional analysis prescribed by this Court in *Butz* v. *Economou*, 438 U.S. 478 (1978), the court below concluded that prison officials who serve on disciplinary tribunals are not entitled to absolute immunity from suits for damages based upon alleged constitutional defects in the adjudicatory proceedings. The courts of appeals are divided on this question. Compare *Ward* v. *Johnson*, 690 F.2d 1098 (4th Cir. 1982) (en banc) (absolute immunity), with the present case and *Jihaad* v. *O'Brien*, 645 F.2d 556, 561 (6th Cir. 1981) (no absolute immunity).

The personal liability of correctional officers who sit on prison disciplinary tribunals is a question of considerable practical importance. In the federal system alone, Institution Discipline Committees adjudicate more than 30,000 cases annually. If only a fraction of these cases results in *Bivens* actions alleging a deprivation of due process, correctional officials will be demoralized and intimidated, prison discipline will be impaired, and the courts will be overwhelmed with additional prisoner suits.



1. In *Butz* v. *Economou*, 438 U.S. at 508-514, this Court analyzed the factors to be considered in determining whether a government official who performs an adjudicatory function is entitled to absolute immunity.[9] The Court explained (*id.* at 512) that participants in legal proceedings, such as judges, prosecutors, and grand jurors, have traditionally enjoyed absolute immunity because of the high likelihood of retaliatory lawsuits and because "the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." The Court then held (*ibid.*) that federal administrative law judges are likewise entitled to absolute immunity because their role is "functionally comparable" to that of a judge.

The Court in *Economou* did not purport to set out inflexible rules for determining whether an official is entitled to absolute immunity from personal damages liability on the ground that he performs a quasi-judicial function. However, we agree with the dissenting judge below that an official is clearly entitled to absolute immunity if it can be shown, as it was in *Economou*, that (1) the official's responsibilities, regardless of his formal position in the government hierarchy, are functionally

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[9] The Court made clear (438 U.S. at 511) that absolute immunity depends upon "the special nature of [the official's] responsibilities" rather than his rank or his "particular location within the Government." This "functional" analysis has been repeatedly reaffirmed. See, *e.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325, 342 & n.28 (1983) ("[I]mmunity analysis rests on functional categories, not on the status of the defendant."); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810 (1982). Thus, the present case is not controlled by *Procunier* v. *Navarette*, 434 U.S. 555 (1978), which held that prison officials are entitled to qualified immunity when performing the administrative task of handling prisoner mail.

comparable to those of a judge; (2) performance of his duties will make him a likely target for harassing or intimidating litigation; and (3) the adjudicatory process includes sufficient safeguards that "tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct" (438 U.S. at 512).

Application of these guidelines to the present case compels the conclusion that petitioners are entitled to absolute immunity. As the dissenting judge below observed (App., *infra*, 22a), "IDC members are involved in the classic judicial function: they are required to determine whether an accused person is guilty or innocent of the charges brought against him." See BOP Policy Statement ¶ 9(b); see also 28 C.F.R. 541.16(c); *Wolff* v. *McDonnell*, 418 U.S. 539, 571 (1974). In carrying out this responsibility, IDC members hear testimony and receive other proof, judge the credibility of witnesses, weigh the evidence, and render a final written decision. Their function is closely analogous to those of judges, grand jurors, and administrative law judges, who are absolutely immune from suit for damages. *Butz*, 438 U.S. at 512-517; *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871).

IDC members also face a severe threat of harassing or intimidating litigation unless they are protected by absolute immunity. Prisoners as a group are prodigious and indiscriminate litigators.[10] See *Ward* v. *Johnson*, 690 F.2d at 1108. If prisoners may sue IDC members for damages based upon alleged constitutional defects in the IDC proceedings, every IDC ruling adverse to the prisoner—*e.g.*, every piece of evidence that is admitted or excluded, every continuance that is granted

[10] For example, in the year ending June 30, 1984, prisoner suits (591 cases) comprised 35% of the Seventh Circuit's civil docket (1649 cases) and 26% of its entire docket (2254 cases). Unpublished information, Administrative Office, United States Courts, Washington, D.C.



or denied, and every unfavorable finding that is made—will be a potential count in a *Bivens* suit seeking extravagant sums in compensatory and punitive damages. See *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976). This problem will be exacerbated because of the "flexible and variable" nature of the requirements imposed by the Due Process Clause, particularly in the prison disciplinary setting. See *Hewitt* v. *Helms*, 459 U.S. 460, 472 (1983). It is clear that prison disciplinary proceedings need not be conducted like trials. *Ibid.*; *Wolff* v. *McDonnell*, 418 U.S. at 560. But the flexible nature of due process requirements will leave prisoners ample opportunity to argue that, under the circumstances of the case, the disciplinary committee departed too far from trial procedures in this or that particular.

Finally, as the present case illustrates, the procedural safeguards of an IDC proceeding provide sufficient assurance that constitutional errors will be avoided or corrected.[11] To insure impartiality, no staff member who reports or investigates an incident may sit on an IDC considering the charge. BOP Policy Statement ¶ 9(a); see 28 C.F.R. 541.16(b). In addition, the chairman and at least one other member of the committee must have the rank of department head or higher. *Ibid.*; see also notes 4 & 7, *supra*.[12] An inmate accused of misconduct is entitled to prior notice of all charges at least 24 hours before his hearing. He may select a correctional staff member as his advocate, and the IDC

[11] BOP regulations governing inmate discipline have been amplified since 1975, but even at that time the regulations "were fairly extensive." App., *infra*, 24a (footnote omitted) (Celebrezze, J., dissenting). Compare PX 7 with 28 C.F.R. 541.10-541.23 (App., *infra*, 37a-60a). Respondents' disciplinary hearing occurred less than one year after the decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and only six months after promulgation of the first regulations governing the procedures at IDC hearings.

[12] Since June 1, 1983, only BOP personnel who have passed a written examination on IDC procedures may be certified to serve on an IDC.

may grant a continuance to allow the advocate to prepare. BOP Policy Statement ¶ 9(c)(1) and (2); see 28 C.F.R. 541.17(a) and (b). At the hearing, the inmate has the right to make a statement, to present documentary evidence, and, under certain circumstances, to call witnesses. BOP Policy Statement ¶ 9(c)(3); see 28 C.F.R. 541.17(c). If the IDC refuses to call a witness requested by the inmate, the reasons must be reflected in the record (*ibid.*). The inmate is generally entitled to be present at all phases of the hearing except the deliberations. BOP Policy Statement ¶ 9(c)(5); see 28 C.F.R. 541.17(d). The IDC is required to keep a detailed record of its actions sufficient to show, inter alia, the Committee's findings and decision, the specific evidence on which it relied, and an explanation for the sanctions imposed. BOP Policy Statement ¶ 9(c)(4); see 28 C.F.R. 541.17(g).

As an additional safeguard, inmates may seek administrative review at three levels—from the warden, the regional director, and the assistant director (general counsel) of the Bureau of Prisons. BOP Policy Statement ¶ 10; see 28 C.F.R. 541.19 and 28 C.F.R. Pt. 542. And as this case demonstrates, an inmate's right to administrative review is not an empty one. "[T]he efficiency of the review is demonstrated by the decision to modify, and, ultimately, to reverse the IDC's decision in this case." App., *infra*, 26a (Celebrezze, J., dissenting). Finally, a prisoner dissatisfied with the disposition of his administrative appeal may seek review under 28 U.S.C. 2241 in federal court. See, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 487-488, 499 (1973) (state habeas corpus); *Johnson* v. *Avery*, 393 U.S. 483 (1969) (state habeas corpus); *Dawson* v. *Smith*, 719 F.2d 896 (7th Cir. 1983); *Jackson* v. *Carlson*, 707 F.2d 943, 946 (7th Cir. 1983); *Kyle* v. *Hanberry*, 677 F.2d 1386 (11th Cir. 1982).

For these reasons—the functional comparability of IDC members to judges, the certain prospects of harassing or retaliatory litigation, and the safeguards designed to prevent and correct constitutional defects—IDC members are entitled to absolute immunity from personal damages liability in suits challenging the committee's proceedings.



2. The court of appeals did not attempt to apply the absolute immunity analysis of *Butz* v. *Economou*. Instead, the court simply relied without discussion on its own precedents holding that state correctional officials who serve on disciplinary committees enjoy only qualified immunity. App., *infra*, 1a-2a; see page 6, *supra*. Moreover, none of these prior decisions discussed the important question of absolute immunity in any detail. Indeed, the only Seventh Circuit decision containing any analysis of the issue is *Mary & Crystal* v. *Ramsden*, 635 F.2d at 600, which merely stated that members of the disciplinary committee at a state juvenile facility performed a function "more similar to that of the school board members in *Wood* v. *Strickland*, 420 U.S. 308 * * * (1975), than to that of a judge." Whatever merit this analogy may have with respect to officials in a juvenile facility, it is far-fetched when applied to officials in a prison. As Judge Celebrezze aptly put it (727 F.2d at 678 n.5): "The difference between the function performed by prison officials and the function performed by school board members is as great as the difference between prisoners and schoolchildren." Furthermore, the procedures followed by the school officials in *Wood* (see 420 U.S. at 312-313) share none of the formality of IDC proceedings. Finally, the Court stated in *Wood* (*id.* at 320) that "absolute immunity * * * would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner." The same is emphatically not true of IDC members.

3. a. The court of appeals' decision in this case is consistent with that of the Sixth Circuit in *Jihaad* v.

*O'Brien*, 645 F.2d 556, 561 (1981)—a decision that is likewise devoid of supporting analysis. However, the decision below conflicts with that of the Fourth Circuit sitting en banc in *Ward* v. *Johnson*, 690 F.2d 1098 (1982).[13] In *Ward*, a state prison inmate filed an action for damages under 42 U.S.C. 1983 claiming that his federal constitutional rights had been violated in the course of a disciplinary hearing conducted by the prison Adjustment Committee, a body analogous in function, composition, and procedure to a federal prison IDC. The alleged constitutional violation was the refusal by the chairman of the Adjustment Committee to call the inmate's witnesses on the ground that their testimony would be repetitive of the written statements they had already provided. 690 F.2d at 1102.

Applying the guidelines in *Economou*, the Fourth Circuit held that the chairman was entitled to absolute immunity. The court of appeals found (690 F.2d at 1106) that there was an "obvious 'functional comparability'" between the chairman's duties on the Adjustment Committee and a judge's responsibilities in a judicial proceeding. The court also concluded (*id.* at 1106-1108) that the Adjustment Committee's procedures, which are generally similar to those of the federal IDCs, provided sufficient safeguards against unconstitutional conduct. The court noted (*id.* at 1106) that the proceedings

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[13] For district court decisions in agreement with *Ward*, see *Anderson* v. *Luther*, 521 F. Supp. 91, 97 (N.D. Ill. 1981) (*Bivens* suit); *Breedlove* v. *Cripe*, 511 F.Supp. 467 (N.D. Tex. 1981) (*Bivens* suit); *Fitchette* v. *Collins*, 402 F.Supp. 147 (D. Md. 1975) (action under 42 U.S.C. 1983). See also *Stewart* v. *Thigpen*, 730 F.2d 1002, 1006 n.1 (5th Cir. 1984) (district court decision held prison officials on disciplinary committee entitled to absolute immunity; court of appeals did not reach issue). Cf. *Simons* v. *Bellinger*, 643 F.2d 774 (D.C. Cir. 1980) (granting absolute immunity to individuals appointed to serve on the District of Columbia Court of Appeals Committee on Unauthorized Practice).



are adversarial in nature and that the prisoner may secure representation, introduce evidence, and question adverse witnesses (*ibid.*). The court also pointed out (*id.* at 1107-1108) that prison officials familiar with the events at issue are disqualified from serving on the Adjustment Committee and that prisoners have the right to two levels of administrative review.

Finally, the Fourth Circuit observed (690 F.2d at 1108) that the denial of absolute immunity would create "a real threat of burdensome and expensive litigation." The court continued (*ibid.*; footnote omitted):

> The proclivities of prison inmates to engage in litigation are prodigious. It has been estimated that between 30 and 40 percent of our appeals in this Circuit concern proceedings by prison inmates. That burden on the courts will be immeasurably increased by allowing suits arising out of disciplinary hearings which have been as carefully structured as this one has been in order to provide every reasonable "safeguard" of an inmate's right to a fair and impartial hearing within the prison context.
> * * *
>
> Moreover, lawsuits, whether meritorious or not, are always burdensome, harassing, and time-consuming. It is difficult enough to secure qualified prison employees. That task will be made more difficult, particularly in securing officials to serve on Adjustment Committees, if, however fair they try to be, such officials are subjected to the hazards of repeated litigation by disappointed defendants in disciplinary hearings. Ordinarily, prison officials are not generously rewarded for their services and the threat of an award against them personally would be a hazard many would feel themselves not justified in risking. The prison system itself will also likely be seriously hampered by a denial to the members of the Adjustment Committee [of] absolute immunity, since prison employees will unquestionably be resistant to accepting appointment as

members of an Adjustment Committee if acceptance entails the serious hazard of being sued personally for their actions strictly as members of the Committee.

b. The situation in *Ward* cannot be meaningfully distinguished from that in the present case. The mere fact that *Ward* involved a state, rather than a federal, prison official obviously does not matter, especially since the court of appeals' decision in this case was founded upon its prior decisions involving state officers.[14]

It is true that the procedures of the state prison Adjustment Committee in *Ward* differ somewhat from those of the federal IDCs,[15] but there is no hint in the Fourth or Seventh Circuit decisions that these differences were responsible for the conflicting results. On the contrary, in *Redding* v. *Fairman*, 717 F.2d at 1117, the Seventh Circuit rejected *Ward* as not representing "the better view." Similarly in this case, the majority followed *Redding* (App., *infra*, 1a-2a), and Judge Cudahy, in concurrence, specifically rejected *Ward* once again (App., *infra*, 10a-11a & n.3).[16]

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[14] It would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz* v. *Economou*, 438 U.S. at 504; *Harlow* v. *Fitzgerald*, 457 U.S. at 809.

[15] For example, under the Virginia system, an inmate has the right to be represented by counsel and to confront and cross-examine adverse witnesses. Neither the Due Process Clause (*Baxter* v. *Palmigiano*, 425 U.S. 308, 320-323 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539, 567-570 (1974)) nor federal prison rules (see pages 11-12, *supra*) provide such rights.

[16] The Fourth Circuit suggested in *Ward* that absolute immunity might not be available if a prison disciplinary hearing denied any semblance of due process. 690 F.2d at 1108-1109. There is no reason to believe that the Fourth Circuit would view that exception as applicable here. (Continued.)



4. The immunity of prison officials who serve on disciplinary committees is an issue of substantial practical importance that requires prompt resolution by this Court. "The administration of a prison * * * is 'at best an extraordinarily difficult undertaking.'" *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 9, quoting *Wolff* v. *McDonnell*, 418 U.S. at 566. See also *Hewitt* v. *Helms*, 459 U.S. at 467. "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial, criminal, and often violent, conduct." *Hudson* v. *Palmer*, slip op. 8. "Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration." *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 132 (1977). Thus, "central to all other corrections goals is the institutional consideration of internal security." *Pell* v. *Procunier*,

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The judgments against petitioners were based on three alleged violations of due process. One of these—the refusal to call defense witnesses whose testimony was believed to be cumulative—was the same violation alleged in *Ward*. Another alleged defect—the failure to call live witnesses in support of the charges—was no violation at all. *Baxter* v. *Palmigiano*, 425 U.S. at 320-323; *Wolff* v. *McDonnell*, 418 U.S. at 567-569. The final alleged defect was the failure to provide adequate notice of the charges of possessing contraband and unauthorized use of the mail. This defect was surely not so great as to distinguish the present case from *Ward*. While an inmate's right to 24 hours notice of disciplinary charges was established in *Wolff*, it is at least arguable that *Wolff* does not apply to the situation here. In this case, the evidence supporting the new charges was originally introduced to prove the charges on the incident reports. Respondent Saxner then admitted that he had committed the additional offenses; and in any event, respondents' possession of the documents was essentially incontrovertible. Moreover, the new charges were no more serious than those in the incident reports, and there is no indication that the new charges resulted in the imposition of any additional punishment.

417 U.S. 817, 823 (1974). However, maintaining order, safety, and discipline in a prison is a formidable task, as events in recent years have dramatically illustrated.

In an effort to enforce the disciplinary rules in federal prisons in accordance with due process requirements, more than 30,000 IDC hearings are held each year, and in almost half of these cases the sanction of disciplinary segregation is imposed. The meting out of punishment naturally produces resentment among those punished. As the Court has noted (*Wolff* v. *McDonnell*, 418 U.S. at 562), disciplinary proceedings take place against a background in which "[g]uards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace." As a result, "[t]he reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority * * *. Retaliation is much more than a theoretical possibility." *Ibid.* In some instances, the retaliatory urge is so great that physical force is used. If prisoners are empowered to strike out against IDC members by suing them personally for damages based upon alleged procedural defects in the disciplinary proceedings, "[s]uch suits could be expected with some frequency" (*Imbler* v. *Pachtman*, 424 U.S. at 425). The urge to turn the tables on prison officials—to make *them* the accused and to disrupt *their* personal lives—will frequently prove irresistible.[17]

The predictable result will be most unfortunate, not only for IDC members, but also for the prison system and the courts. Exposing IDC members to a civil suit for damages "would seriously cripple" (*Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)) the viability of the

[17] Moreover, since prisoners are generally barred by sovereign immunity from suing the United States or the Bureau of Prisons for damages, the IDC members will bear the full brunt of the prisoners' resentment.



prison dispute resolution system by threatening the freedom and independence of these decision makers. Only the most stalwart or foolhardy prison officials would willingly serve on IDCs. *Harlow*, 457 U.S. at 814; *Economou*, 438 U.S. at 509-510; *Ward* v. *Johnson*, 690 F.2d at 1108; *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1948), cert. denied, 339 U.S. 949 (1950); see *Taylor* v. *Kavanagh*, 640 F.2d 450 (2d Cir. 1981). And those who do serve would inevitably be influenced in their rulings by the threat of retaliatory lawsuits.

In defending the decision below, Judge Cudahy lightly dismissed these concerns by observing (App., *infra*, 15a) that IDC members "are accorded adequate protection against harassment by the enlarged safeguards of qualified immunity as announced in *Harlow*." Of course, this same argument could be made in an effort to show that judges should not be absolutely immune from damages liability. Unless protected by absolute immunity, however, judges would be swamped and demoralized by suits brought by disgruntled litigants, even if it appeared likely that all or most of those suits would ultimately be dismissed on qualified immunity grounds. The psychological burden, as well as the real economic effects, of defending against such suits would be considerable. The same is true for IDC members, who need and deserve the same protection if the prison disciplinary system is to continue in its present form.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1984

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Nos. 82-1799, 82-1816

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DAVID SAXNER AND ALFRED CAIN, JR.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

*v.*

CHARLES BENSON, ET AL.,
DEFENDANTS-APPELLANTS,
CROSS-APPELLEES.

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Argued June 3, 1983.
Decided Feb. 13, 1984.
Rehearing and Rehearing En Banc Denied June 8, 1984.

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Before WOOD and CUDAHY, *Circuit Judges*, and CELEBREZZE, *Senior Circuit Judge.**

HARLINGTON WOOD, JR., *Circuit Judge.*[1]

Originally the most important issue in this case was whether the members of the prison Institutional Disciplinary Committee were entitled to absolute immunity, not merely qualified immunity, from suits alleging the deprivation of a prisoner's constitutional rights. In the meantime, however, this court in *Redding* v. *Fairman*, 717 F.2d 1105, 1117 (7th Cir.1983), has resolved the immunity issue by adhereing [*sic*] to *Chavis* v. *Rowe*, 643

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* The Honorable Anthony J. Celebrezze, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

[1] The author acknowledges the substantial assistance of Judge Celebrezze to this opinion by contributing Section I.

F.2d 1281, 1288 (7th Cir.), *cert. denied*, 454 U.S. 907, 102 S.Ct. 415, 70 L.Ed.2d 225 (1981), and *Mary and Crystal* v. *Ramsden*, 635 F.2d 590 (7th Cir.1980), in finding no basis or justification for absolute immunity.[2]

The only remaining issues are whether or not the compensatory damages awarded by the jury and approved by the trial court are excessive, and whether the trial court erred in denying plaintiff's request for attorneys' fees under the Equal Access to Justice Act (28 U.S.C. § 2412).

I.

The defendants are senior correctional officers at the federal correctional institution at Terre Haute, Indiana. The plaintiffs, David Saxner and Alfred Cain, Jr., are former inmates of the institution. In 1975, the Terre Haute prison had a staff of 350 people; it housed nearly 2,000 inmates in its main facility and approximately 300 in its farm camp. In January, 1975 a prisoner died in the prison hospital under circumstances which were not entirely clear; shortly thereafter the prisoners engaged in a two day work stoppage to protest the inmate's death. The plaintiffs apparently did not participate in the work stoppage. Instead, they endeavored to discover the circumstances surrounding the prisoner's death and to report their findings to interested members of the press and public. Their efforts were partly responsible for an investigation of the prison's hospital and the resignation of the prison's physician.

[2] This panel, nevertheless, recognizes and respects the thoughtful contrary analysis advanced by Judge Celebrezze who dissents from the resolution of this issue. His arguments suggest that in due time the issue may merit reconsideration in this circuit. District Judge Dillon, the original district judge to consider this case, also agreed with the view that defendants were entitled to absolute immunity, but reconsidered and changed his holding following *Mary and Crystal* v. *Ramsden*, 635 F.2d 590.



On February 14, 1975, the plaintiffs were each charged with encouraging others to engage in another work stoppage, and they were confined to a section of the hospital being used as an administrative segregation unit. Saxner was notified of his right to a hearing, to be represented by a staff member of his choice, and to present testimony and documentary evidence; the record does not indicate that Cain ever received a copy of a similar notice.

The plaintiffs, who had remained in segregation, appeared before the Institutional Disciplinary Committee (IDC) on February 21, 1975. On that day, the IDC was composed of Theodore Cleavinger, an associate warden, Marvin Marcadis, a correctional supervisor, and Tom Lockett, chief of case management.[3]

At the hearing before the IDC, Saxner was represented by a staff counselor of his choice. After reading the charge against Saxner, the incident report was introduced, as well as three documents written by Saxner; no guards or inmates were called to testify,[4] but Saxner was permitted to introduce affidavits of several inmates, and to testify on his own behalf. At the close of evidence, the IDC found Saxner guilty of encouraging a work stoppage. The IDC also found Saxner guilty of two other offenses with which he had not been

[3] Generally, IDCs at Terre Haute were composed of three members. At least two of these members necessarily were senior correctional officers with a rank of department head level or higher. The third member was normally a less senior member of the correctional staff. Staff members who witnessed the incident were excluded from membership in the IDC, unless the incident was so widely witnessed that every staff member witnessed it. Also named in the complaint were Charles Benson, warden, and C.D. Wilson, administrative supervisor, who by reason of a directed verdict and a favorable jury verdict are no longer in the case.

[4] Saxner attempted to produce several inmates to testify; this testimony was excluded because it was considered cumulative.

charged: possession of contraband and unauthorized use of the mail.[5] The IDC ordered that Saxner be confined in administrative segregation for an indefinite period, and that he forfeit 84 days of good time; it also recommended that he be transferred to another institution.

Cain's hearing was held on the same day, before the same three correctional officers. Cain denied that he had encouraged others not to work and demanded an opportunity to examine his accuser. The IDC produced an incident report, which contained the particulars of the work stoppage charge, and two other documents which had been seized in an administrative search of his cell; no other evidence was produced. Cain was found guilty of the original work stoppage charge and of an additional charge of possession of contraband (the materials which had been seized in the search of his cell). The IDC ordered that Cain be confined in administrative segregation indefinitely, and that he forfeit 96 days of good time; the IDC also recommended that Cain be transferred to another institution.

Each plaintiff was informed of his right to appeal the IDC's decision, and both plaintiffs appealed the IDC's decision to the warden of the prison. The warden granted part of the relief sought by the plaintiffs on appeal: he restored the forfeited good time and ordered the plaintiffs' release from administrative segregation; the warden refused, however, to expunge their records. Both plaintiffs appealed to the Regional Office of the Bureau of Prisons; based upon the Regional Office's

[5] The basis for these charges, and the additional charges against Cain, were certain documents seized in the course of administrative searches of their cells. In Saxner's cell, a "press release" was found detailing the problems with the prison hospital; the document had been sent to fifty newspapers. Other documents of a similar nature were also seized. In Cain's cell, a letter detailing the need for a prison labor union was found.



recommendation, the records of both Cain and Saxner were expunged.

This action was commenced in March, 1975, while the plaintiffs were still in administrative segregation. The initial complaint was filed *pro se*. Subsequently, counsel was retained and the complaint was amended several times; the third amended complaint sought declaratory, injunctive, and monetary relief for alleged deprivations of the plaintiffs' first, fourth, fifth, sixth, and eighth amendment rights resulting from the hearings before the IDC in February 1975.

Prior to trial, the defendants moved for judgment on the pleadings, asserting that they were entitled to absolute immunity from liability for actions taken in their capacity as IDC members. Although the district court granted the motion, it held, on reconsideration, that the defendants were entitled only to qualified immunity in light of this court's decision in *Mary and Crystal* v. *Ramsden*, 635 F.2d 590. The case was tried to a jury in April, 1981; the jury found in response to special interrogatories, that all three of the IDC members had violated the plaintiffs' fifth amendment right to due process. The jury awarded each plaintiff $4,500 as compensatory damages.[6] In May, 1981 the defendants moved for judgment notwithstanding the verdict, arguing that the verdict was excessive; the motion was denied. The plaintiffs moved for an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; this motion was also denied. The defendants appeal, arguing that the IDC members are entitled to absolute immunity, an issue we have already addressed, and that the jury's verdict was excessive. The plaintiffs have cross-appealed, arguing that they are entitled to

[6] Each plaintiff was awarded $1,500 from each defendant; thus, each defendant was exposed to liability for $3,000 of the full damage award.

an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

II.

The jury award of compensable damages in the amount of $4,500 to each plaintiff was found by the trial court, in ruling on defendants' motion for judgment notwithstanding the verdict, to be supported by sufficient evidence. The defendants find no fault with the jury instructions based on *Carey* v. *Piphus*, 435 U.S. 247, 262-64, 98 S.Ct. 1042, 1051-1052, 55 L.Ed.2d 252 (1978), claiming only that the amount was excessive.

Cain spent 35 days in segregation where he was confined almost 24 hours a day without access to the prison yard or other exercise facilities. He also lost various other privileges. Cain could not, while in segregation, earn good time, and his possible parole was affected. Saxner spent his first week in a windowless segregation cell in extremely unsanitary and repulsive conditions. He was not allowed out of that cell. For a few days he had no bedding, soap or adequate lighting. Later he was transferred to a different unit for two weeks.

The trial court credited plaintiffs' testimony to establish mental and emotional distress injuries attributable to the due process violations. The trial court found that the "anguish and frustration which flowed from the patent unfairness of the hearings and the fear that such unfair treatment would continue in the future in their administrative review and appeals, at their parole hearings, and in their day to day existence in the segregation units unrelated to the issue of the length (35 days) of time served in segregation" contributed to their actual injuries. The trial judge noted that nominal damages are all that are due upon a showing of a denial of due process without proof of actual damage, as injury cannot be presumed from denial of due process. *Carey* v. *Piphus*, 435 U.S. at 258, 98 S.Ct. at 1049. However, being convinced that plaintiffs had established "the link



between the due process violations and the actual injury consequences," the trial judge allowed the awards to stand.

The awards may be somewhat excessive, but so are the defendants' arguments which characterize plaintiffs' damages as "little more than a litany of diminished creature comforts combined with generalized claims of anxiety." In view of the general restrictions on appellate review of a jury's award of monetary damages, we will not substitute our judgment in these circumstances for that of the judge and jury who heard the testimony. Our own review of the evidence briefly summarized above satisfies us that "the trial judge did not abuse his discretion in finding 'nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a runaway jury or one that lost its head.'" *Gruenthal* v. *Long Island Railroad Co.*, 393 U.S. 156, 160, 89 S.Ct. 331, 334, 21 L.Ed.2d 309 (1968).

III.

Plaintiffs, as prevailing parties, claim they are entitled to an allowance of attorneys' fees under alternative theories.

During the time this suit was still pending in the district court on post-trial matters, the Equal Access to Justice Act, 28 U.S.C. § 2412, became effective on October 1, 1981. Although the Act broadened the liability of the government for attorneys' fees and expenses, it contained certain prerequisites. Sections 2412(b) and (d) limit this broadened attorneys' fees relief to actions "brought by or against the United States or any agency and any official of the United States acting in his or her official capacity." The trial judge disallowed the attorneys' fees because the United States was not named as a party defendant, nor were the defendants named as officials of the United States acting in their official capacities, although in fact they may have been so acting.

We agree with the district court. Plaintiffs do not satisfy the statutory requisites for attorneys' fees under the Act. The United States was not named, and the defendants were named only individually. In addition to the absence of any allegation that the defendants were acting in their official capacities, it is specifically alleged in paragraph 10 of the Third Amended Complaint, upon which the case was tried, that "All defendants are sued in their individual capacities." Plaintiffs would now have us remodel their complaint or give its allegations some subtle interpretation in variance with its plain language so as to qualify under the fees statute. The timing of this lawsuit and the enactment of the Equal Access to Justice Act may be unfortunate, but we cannot change those circumstances.

Plaintiffs alternatively claim to be entitled to an award of attorneys' fees under section 2414(b) of the Act, although plaintiffs concede that section also requires that the action meet the "official capacity" requirement. Plaintiffs urge that we read section 2412(b), permitting an award of attorneys' fees against the federal government to the same extent that fees may be awarded in cases involving "any other party," as opening the way for attorneys' fees through the Civil Rights Attorneys Fees Award Act, 42 U.S.C. § 1988. That Act provides for an award of fees in actions enforcing certain provisions of the Civil Rights Act, including 42 U.S.C. § 1983. After that argument brings us to section 1983, we are then urged to overlook section 1983's "acting under color of state law" requirement. The plaintiffs' claims here, they argue, are virtually identical to the usual section 1983 action so that attorneys' fees should be allowed under color of federal as well as



state law. That argument deserves credit for originality, but it is too original.[7]

Under the circumstances in this case we cannot send the government a judicial bill for plaintiffs' attorneys' fees.

The parties shall bear their own costs.

AFFIRMED.

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[7] It appears that in the district court plaintiffs argued an entitlement to fees upon a bad faith contention. *Hall* v. *Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); *Alyeska Pipeline Company* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). The district court found the defendants' actions were not vexatious, wanton, or oppressive sufficient to require an award of attorneys' fees. Although that argument was not specifically advanced here, we would not disturb the trial judge's findings on the basis of this record.

CUDAHY, *Circuit Judge*, concurring.

I believe that *Redding* v. *Fairman*, 717 F.2d 1105 (7th Cir.1983), is entirely sound in its resolution of the issue of absolute immunity for a prison disciplinary committee. I must therefore, in view of the somewhat ambiguous tone of footnote 2 and in light of the dissent, respectfully indicate my support of *Redding* as an expression of the circuit position.[1] Any effort to analogize a trio of correctional officers conducting disciplinary proceedings in a prison to a "judge" or even to an administrative law judge, *see Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), is unwarranted.

The activities and procedures of these prison officers are so dissimilar in form and substance from those of judges granted absolute immunity that reliance on an all-encompassing similarity of quasi-judicial function will not wash. As Chief Judge Winter has pointed out, performance of "quasi-judicial" functions does not automatically trigger absolute immunity. *Ward* v. *Johnson*, 690 F.2d 1098, 1115 (4th Cir.1982) (Winter, C.J., dissenting). Thus, in *Wood* v. *Strickland*, 420 U.S. 308, 320-21, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975), school board members, who were sued for due process violations in disciplinary proceedings, were afforded

[1] I note that this circuit is not alone in its view that members of the Institutional Disciplinary Committee ("IDC") of a federal prison are not absolutely immune from damages for constitutional violations. In *Sihaad* [*sic*] v. *O'Brien*, 645 F.2d 556 (6th Cir.1981), the court rejected the same claim pressed by the defendants in this case, holding that IDC members are not "in one of 'those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.'" *Id.* at 561 (quoting *Butz* v. *Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978)).



only qualified immunity.[2] *See Ward* v. *Johnson*, 690 F.2d at 1115-16 (Winter, C.J., dissenting).[3] The prison disciplinary proceedings at issue here are certainly much more akin to the school board meeting in *Wood* than to a hearing conducted by an ALJ under the Administrative Procedure Act.

In any event, a comparison of this case with *Butz* shows how extraordinarily short the case before us falls of the standards prescribed in *Butz*. Among the characteristics of administrative law proceedings which the *Butz* court deemed significant were (1) the impartiality of the decisionmaking process and the reliability of the information developed; (2) the importance of precedent in resolving controversies; (3) the adversary nature of

[2] The dissent fails to recognize the importance of *Wood* v. *Strickland* to the proper resolution of this case. The functions performed by the *Wood* defendants were every bit as "judicial" as those of the defendants here, yet they received only qualified immunity. The dissent dismisses *Wood* (without actually naming it) by asserting that the IDC members cannot be compared to school board members. The dissent in this respect apparently discards the functional approach to immunity which it advocates elsewhere and instead apparently relies on the title of the officials and the context within which they operate. As is demonstrated below, quasi-judicial functions are performed by many executive officials, and only in the most extraordinary cases are they absolutely immune from damage liability. Whether an official's function and position in the government is far enough removed from the school board members in *Wood* to justify absolute immunity under *Butz* may be the key question in the case. I suspect that the Supreme Court went as far as it is willing to go with quasi-judicial immunity in *Butz* itself.

[3] The dissent's reliance on *Ward* v. *Johnson*, 690 F.2d 1098 (4th Cir.1982) is inappropriate since *Ward* was rejected in this circuit as not representing "the better view." *Redding*, 717 F.2d at 1117. In *Redding* this circuit endorsed the Sixth Circuit's view that federal disciplinary committee members have only qualified immunity from damage liability. *Id.*

the proceedings; and (4) the availability of review. *Butz* at 512-13, 98 S.Ct. at 2913-2914.

The *Butz* court relied on the Administrative Procedure Act and noted that "federal administrative law requires that agency adjudication contain many of the same safeguards as found in the judicial process...." *Id.* at 513, 98 S.Ct. at 2914. These protections include notice, representation by a lawyer, a verbatim transcript of the proceedings, subpoena power, presentation of oral and documentary evidence, cross-examination of adverse witnesses under oath (limited only by considerations of relevancy and materiality), rebuttal evidence and prehearing discovery. 5 U.S.C. §§ 554-57. The Act also provides for imposition of the burden of proof, findings and conclusions presented by the parties and ruled on by the hearing officer and a host of other procedural safeguards. The hearing officer may not also be involved in prosecutorial or investigative duties or be supervised by an employer interested in the case, and is subject to recusal for personal bias. The dissent fails to recognize the importance of these procedural safeguards, which were specifically relied upon by the *Butz* court and are almost all absent from IDC proceedings.

The disciplinary policy of the Bureau of Prisons provides few of the safeguards of the APA. The committee members are prison guards and supervisory employees who are in daily contact with the prisoners upon whom they sit in judgment. The committee members are supervisors and fellow employees of the guards who bring the charges and are in an unequal adversarial relationship with the prisoners. They are the keepers judging the kept rather than impartial adjudicators trained in law and presumably free of bias and prejudice. In addition, the information presented to the committee is frequently hearsay, self-serving and unreliable. *See Bracy* v. *Herringa*, 466 F.2d 702 (7th Cir.1972). Of course,



the decisions of the committee are not based on precedent since there is no recorded precedent. And review is restricted to agencies of the Bureau of Prisons. To suggest that the committee functions in any real respect like the administrative law judge in *Butz* is to depart from reality.

The suggestion that members of the prison disciplinary committees are entitled to absolute immunity also ignores a major premise of the entire immunity doctrine—that absolute immunity is the *rare exception* to the rule granting qualified immunity to public officials performing discretionary functions. *See Ward* v. *Johnson*, 690 F.2d 1098, 1114 (4th Cir.1982) (Winter, C.J., dissenting). *See also Nixon* v. *Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (most executive officials entitled only to qualified immunity); *accord Harlow* v. *Fitzgerald*, 457 U.S. 800, 814-15, 102 S.Ct. 2727, 2736-2737, 73 L.E.2d 396 (1982). Thus in *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), school board members who were clearly performing quasi-judicial functions (a factor heavily relied upon by the dissent with respect to IDC members) were granted only qualified immunity from damage suits arising out of disciplinary meetings. This circuit, by rejecting the majority position in *Ward* v. *Johnson* as not representing the "better view" (*see Redding*, 717 F.2d at 1117), has clearly decided not to create another exception to the qualified immunity rule.

The dissent, by attempting to apply, perhaps mechanistically, the four factor *Butz* test, loses sight of the overriding concern the Supreme Court expressed in *Harlow* and *Butz*, that grants of absolute immunity are appropriate only when the defendant official establishes that *public policy* so requires.[4] *Harlow*, 457 U.S. at

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[4] The dissent, I believe, makes the error of presenting the question as implicating "the need to protect *officials* who perform judicial or quasi-judicial functions." *Infra* at 676-677 (em-

808, 102 S.Ct. at 2734; *Butz*, 438 U.S. at 506, 98 S.Ct. at 2910-2911. We said, in evaluating parole board members' claims to absolute immunity, that it should not be granted "absent compelling reasons." *United States ex rel. Powell* v. *Irving*, 684 F.2d 494, 495 (7th Cir.1982). No such reasons exist, nor have any been argued, for granting absolute immunity to prison disciplinary committees.

The dissent does not even attempt to justify absolute immunity here on policy grounds. Instead, it relies on a quite inappropriate functional test and a loose (at best) comparison with the responsibilities of the administrative law judges in *Butz*. But *Harlow* made clear that if public policy does not require absolute immunity, an official's function becomes irrelevant. The dissent makes no effort to explain why public policy requires absolute immunity for adjudicatory disciplinary proceedings in *prisons* but not in *schools*. Certainly, education is as vital to our society as punishment. In any event, if public policy does not require absolute immunity for the high ranking presidential aides in *Harlow*, it does not, by any stretch of the imagination, require absolute immunity for comparatively low ranking prison officials dispensing discipline.

It would be poor policy to extend absolute immunity to these defendants. The Supreme Court has recently charted a course which suggests a broadening of the protections of *qualified* immunity coupled with conferral of new grants of *absolute* immunity primarily upon defendants occupying a high place on the governmental ladder. Thus, in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Court made it more difficult for plaintiffs to prevail over a defense of qualified immunity by eliminating any require-

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phasis supplied). The Supreme Court has made it clear that absolute immunity is granted only to protect the *public interest* and not the interests of the officials involved.



ment that the defendant show subjective good faith. *Cf. Egger* v. *Phillips*, 710 F.2d 292, 323 (7th Cir.1983) (*en banc*) (Cudahy, J., concurring). This makes it more likely that defendants will prevail on summary judgment, *Harlow*, 457 U.S. at 816, 102 S.Ct. at 2738, thus reducing the burden of, and the possible intimidation resulting from, litigation. And in *Nixon* v. *Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), by extending absolute immunity to the President because of his high office, the Court indicated that the position an official occupies in the federal system may be relevant to the determination of what sort of immunity applies.[5] At least, the governmental rank of the official is relevant to the determination whether public policy requires absolute immunity. Here, of course, we are dealing with comparatively low-level officials whose duties are only quite incidentally "judicial" in any sense. And they are accorded adequate protection against harassment by the enlarged safeguards of qualified immunity as announced in *Harlow*.

Additionally, I note that the Supreme Court, in analyzing the issue of absolute immunity, has relied primarily upon the purposes of the post-Civil War amendments and of the Civil Rights Statutes. Thus, *Briscoe* v. *LaHue*, ___ U.S. ___, 103 S.Ct. 1108, 75 L.Ed.2d

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[5] The dissent notes, correctly, that the Supreme Court in *Nixon* v. *Fitzgerald* claimed reliance on the "special functions" doctrine. However, no mention is made in *Nixon* of presidential functions' necessitating absolute immunity. Instead, the Court relied on the President's "unique position in the constitutional scheme." *Id.*, 457 U.S. at 749, 102 S.Ct. at 2702. The dissent also suggests that in evaluating whether public policy requires absolute immunity, we are to look only at the function performed by the official in question. One need look no further than *Wood* v. *Strickland*, *supra*, to conclude that the dissent is incorrect in insisting that public policy uniformly dictates absolute immunity for those who perform judicial or quasi-judicial functions.

96 (1983), which confirmed the absolute immunity of police witnesses at trials, was based upon a searching analysis of the state common-law immunity immediately after the Civil War. Congress is presumed to have acted in the context of common law immunities. I doubt that such an inquiry into the purposes of the post-Civil War amendments and statutes, which the dissent does not attempt to undertake, could support absolute immunity for prison disciplinary committees since the 1871 Congress was greatly concerned about the proper functioning of the penal system.

I therefore concur fully in the majority opinion except for any possible implication of dissatisfaction with the refusal of this circuit to grant absolute immunity to prison institutional disciplinary committees.



CELEBREZZE, *Senior Circuit Judge*, dissenting.

The majority has failed to analyze the immunity issue presented by this case consistent with the Supreme Court's decision in *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Respectfully, I dissent.

The Supreme Court in *Butz* established clearly that in some circumstances executive officials performing judicial or quasi-judicial functions are absolutely immune from liability for any tortious acts.[1] *Butz* v. *Economou*, 438 U.S. at 508-17, 98 S.Ct. at 2911-2912, 2916 (administrative law judge absolutely immune). For an official to demonstrate that he is entitled to absolute immunity

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[1] Normally, a prison official is entitled to qualified immunity from liability for acts occurring in the course of his duties. *Procunier* v. *Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). *See Butz* v. *Economou*, 438 U.S. 478, 498, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). The type of immunity to be accorded an official, however, is not a function of that official's position within the hierarchical structure of government. *Id.* at 511, 98 S.Ct. at 2913. Rather, the type of immunity to be accorded a particular official depends upon the duties the official was discharging at the time the allegedly tortious conduct occurred. *E.g.*, *Stump* v. *Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978) (type of immunity available to a judge depends upon the nature of the act); *Hampton* v. *City of Chicago*, 484 F.2d 602, 608 (7th Cir.1973), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974) (nature of prosecutor's immunity depends upon character of conduct). *See Apton* v. *Wilson*, 506 F.2d 83, 91-92 (D.C.Cir.1974) (prosecutor absolutely immune only when participating in judicial process); *Lopez* v. *Vanderwater*, 620 F.2d 1229, 1233 (7th Cir.), *cert. dismissed*, 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980) (judge absolutely immune if unconstitutional act is judicial in character).

for his acts, he must show: that his decisions are functionally comparable[2] to the type of decisions made by a

[2] The concurrence believes that the Supreme Court in *Nixon* v. *Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), granted the President of the United States absolute immunity "because of his high office." According to the concurrence, the "rank of the official" determines whether public policy requires absolute immunity; it reasons that "if public policy does not require absolute immunity for the *high ranking* presidential aides in *Harlow*, it does not, by any stretch of the imagination, require absolute immunity for comparatively low ranking prison officials dispensing discipline" (emphasis added). Clearly, the concurrence's assertions that this dissent relies improperly on an official's "title" and disregards the "functional approach to immunity law" are unfounded.

Contrary to the concurrence's assertions, the Supreme Court has stated repeatedly that the type of immunity to be afforded executive officials *does not* depend upon the official's "high" position in the executive branch. *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 808-809, 102 S.Ct. 2727, 2733-2734, 73 L.Ed.2d 396 (1982); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 744-47, 102 S.Ct.2690, 2699-2700, 73 L.Ed.2d 349 (1982); *Butz* v. *Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978). Instead, the Supreme Court has held consistently that the type of immunity available to executive officials depends upon the functions performed by the particular official claiming immunity. *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810, 102 S.Ct. 2727, 2734, 73 L.Ed.2d 396 (1982); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 751, 102 S.Ct. 2690, 2702, 73 L.Ed.2d 349 (1982); *Butz* v. *Economou*, 438 U.S. 478, 508, 98 S.Ct. 2894, 2911-2912, 57 L.Ed.2d 895 (1978). Accordingly, the Supreme Court in *Nixon* did not grant the President of the United States absolute immunity "because of his high office." Instead, the Supreme Court reasoned that absolute immunity was necessary to permit the President to fulfill responsibilities important for the effective functioning of our government. Similarly, the Supreme Court in *Harlow* did not hold that "public policy does not require absolute immunity for . . . high ranking presidential aides." Indeed, the Supreme Court expressly *reserved* the question whether the petitioners, on remand, could prove that their functions were so sensitive as to justify a grant of absolute immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982). I believe that the Supreme Court's decisions in *Butz*, *Nixon* and *Harlow* confirm the continued vitality of the "special functions" doctrine. Consistent with the Supreme Court's approach to immunity law, the critical inquiry does not depend upon the fact that this case involves "comparatively low-level officials", but rather, upon the functions which these officials were performing at the time that the alleged constitutional violation occurred.



judge, that the controversies which the official resolves are sufficiently intense to spawn harassing or intimidating litigation, and that the adjudicatory process over which the official presides contains sufficient safeguards to lessen the "need for individual suits to correct constitutional error." *Id.* at 512, 98 S.Ct. at 2914. Although several courts have applied the *Butz* analysis in a similar context, *e.g. Reed* v. *Village of Shorewood*, 704 F.2d 943, 951-52 (7th Cir.1983) (liquor control commissioner absolutely immune for quasi-judicial acts); *United States* v. *Irving*, 684 F.2d 494, 496-97 (7th Cir.1982) (parole board members absolutely immune for quasi-judicial acts); *Segarra* v. *McDade*, 706 F.2d 1301, 1305 (4th Cir.1983); *Ward* v. *Johnson*, 690 F.2d 1098 (4th Cir.1982) (en banc) (prison officials absolutely immune for quasi-judicial acts), one may not generalize safely from the holdings in those cases; every case differs in the degree which the official asserting absolute immunity is comparable to a judge, in the degree to which he is exposed to harassing litigation, and in the degree which the procedural formality of the proceeding is sufficient to assure that constitutional error, if it occurs, will not go uncorrected. Accordingly, each factor must be analyzed in the context of the facts and circumstances existing at the time the plaintiff's rights were infringed. Absent such analysis, a court cannot balance the need to protect the rights of citizens against the need to protect officials who perform judicial or quasi-judicial functions.[3]

[3] According to the concurrence, this dissent focuses improperly on protecting *officials*, rather than the *public interest*. The concurrence reasons that public policy is the threshold question;

I believe that this circuit has failed to analyze fully immunity issues concerning the special functions doctrine.[4] Without discussion, the majority holds that the federal correctional officers in this case are not entitled to absolute immunity; it believes that this court's decision in *Redding* v. *Fairman, et al.*, 717 F.2d 1105 (7th Cir.1983) is dispositive. Without discussion, this court in *Redding* held that prison officials of the Illinois Department of Corrections were not entitled to absolute immunity; it believed that this court's decision in *Mary and Crystal v. Ramsden*, 635 F.2d 590 (7th Cir. 1980)

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"if public policy does not require immunity, *an official's function becomes irrelevant*." (emphasis added).

As the concurrence recognizes, the critical question is whether public policy justifies conferring upon an official the right to absolute immunity. The concurrence fails to recognize, however, that we define the need for such protection by examining the *function* performed by the official. Quite logically, this approach has been called the "functional approach to immunity law." *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810, 102 S.Ct. 2727, 2734, 73 L.Ed.2d 396 (1982). In other words, the importance of the function defines the public interest. In my view, the concurrence's suggestion that we first examine the public interest and if the interest is insufficient disregard the function performed by the official claiming immunity, is inconsistent with the basic rationale of the functional approach to immunity law. Whether the "functional test" established by the Supreme Court is an "inappropriate" approach to immunity law is not the issue. The issue in this circuit concerns this court's willingness to follow Supreme Court precedent.

[4] The exception is this court's decision in *United States* v. *Irving*, 684 F.2d 494 (7th Cir.1982). In *Irving*, the question presented was whether certain parole board members were entitled to absolute immunity. In an excellent discussion, this court found that the parole board members performed a task "functionally comparable" to judges, that the parole board members faced "the same risk of constant unfounded suits," and that the safeguards available protected adequately prisoners' parole rights. *Id.* at 496-97. Accordingly, this court held that these parole board members were entitled to absolute immunity. *Id.*



was dispositive. In *Mary and Crystal*, the primary issue was whether staff members at Goodland State Camp, a Wisconsin juvenile correctional institution, were entitled to absolute immunity. This court acknowledged that the threshold question was whether the staff members performed a function comparable to that of a judge; it concluded that the staff members of the juvenile center performed a function more akin to the function performed by school board members. *Id.* at 600. I do not believe that one can assert rationally that the function performed by the federal correctional officers in this case, who serve on a disciplinary committee in a federal penitentiary, is equivalent to the function performed by school board members.[5] The experience in this circuit demonstrates the need to analyze carefully each of the factors established by *Butz*.[6]

In this case, the defendants are federal correctional officers who serve on a committee called the Institutional Disciplinary Committee (IDC).[7] Although, as

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[5] The difference between the function performed by prison officials and the function performed by school board members is as great as the difference between prisoners and schoolchildren. *See Ingraham* v. *Wright*, 430 U.S. 651, 669, 97 S.Ct. 1401, 1411, 51 L.Ed.2d 711 (1977) ("The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.")

[6] For example, the question whether the available procedural safeguards are sufficient to assure that constitutional error will not go uncorrected depends on the particular procedures available. The procedural safeguards available to inmates who appear before the members of the IDC are not the same set of procedures available to juvenile inmates at a Wisconsin Juvenile Correctional Institution. *Mary and Crystal* v. *Ramsden*, 635 F.2d 590, 594 n.1 (7th Cir.1980) (juvenile defendants were not permitted to have advocates at the hearing, were not permitted to question witnesses, and were not permitted to produce witnesses in their defense).

[7] This circuit has twice concluded that prison officials involved in the disciplinary process were entitled to qualified im-

prison officials they were primarily responsible for the day-to-day operations of the prison, they argue that they were discharging a quasi-judicial function while serving on the IDC, and, thus, that they ought to be entitled to absolute immunity for these acts in light of *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). I agree.

Clearly, the appellants, as members of the IDC, are functionally comparable to judges. Indeed, IDC members are involved in the classic judicial function: they are required to determine whether an accused person is guilty or innocent of the charges brought against him. *See* Bureau of Prisons Policy Statement, 7400.5C (1974), Sec. 9(b). *See also* 28 C.F.R. Sec. 541.14(c). They are required to judge the credibility of witnesses, to weigh the evidence, and to make a principled determination of guilt or innocence. Because the IDC members discharge responsibilities which are identical to judges,[8] I believe that the first prong of the *Butz* test is satisfied. *See United States* v. *Irving*, 684 F.2d 494, 496-97 (7th Cir.1982) (parole board members are functionally comparable to judges). *Cf. Reed* v. *Village of Shorewood*, 704 F.2d 943, 951 (7th Cir.1983) (liquor control commissioner entitled to absolute immunity because acting in "judicial capacity").

munity. *Chavis* v. *Rowe*, 643 F.2d 1281 (7th Cir.1981); *Hayes* v. *Thompson*, 637 F.2d 483 (7th Cir.1980). In both of these cases, however, the question whether prison officials are entitled to absolute immunity does not appear to have been presented or decided; neither case cites or discusses the Supreme Court's decision in *Butz*.

[8] The justification for affording absolute immunity to executive officials who perform quasi-judicial functions is patently obvious. Like parole board members and federal court judges, officials who serve on a disciplinary committee in a federal penitentiary perform the function of rendering "impartial decisions in cases and controversies that excite strong feelings because the litigant's liberty is at stake. They face the same risk of constant unfounded suits by those disappointed by their decisions." *United States* v. *Irving*, 684 F.2d 494, 497 (7th Cir. 1982). ("The adjudicatory process simply could not work if the adjudicator had to anticipate a possible lawsuit from every dissatisfied litigant.").



The likelihood that an adverse decision would result in harassing or intimidating litigation is equally apparent. *Ward* v. *Johnson*, 690 F.2d 1098, 1108 (4th Cir.1982) (en banc). *See United States* v. *Irving*, 684 F.2d at 497 (danger that parole board members will be harassed by retaliatory suits). The ability of prisoners to generate litigation is substantial and well documented. *See Ward* v. *Johnson*, 690 F.2d at 1108. The burden of such prodigious litigation upon IDC members would be substantial in terms of time and money; these burdens are likely to affect the fashion in which IDC members discharge their quasi-judicial functions.

In my opinion, the final factor in *Butz*, whether the procedural safeguards are sufficiently formal to assure that constitutional error will not go uncorrected, is the crux of this dispute. *See Butz* v. *Economou*, 438 U.S. at 512, 98 S.Ct. at 2913-2914; *Reed* v. *Village of Shorewood*, 704 F.2d at 952. This factor is an expression of the inverse relationship between procedural regularity and the incremental deterrent effect of qualified immunity; if the formality of the procedure is sufficient to assure that constitutional error will be corrected, then qualified immunity will have only a marginal deterrent effect which, in turn, will not warrant exposing persons acting in a quasi-judicial function to the risk of personal liability and the expense of defending against the complaint of a disappointed litigant. *See Simons* v. *Bellinger*, 643 F.2d 774, 782 (D.C.Cir.1980) ("The presence of these checks reduces the need for private causes of action and thereby renders absolute immunity appropriate."). Thus, absolute immunity is justified only when the procedures afforded the litigants are sufficient to assure that the risk of uncorrected constitu-

tional error is low, and the attendant need for the incremental deterrent effect of qualified immunity is limited.

The procedures in effect at the time of the plaintiff's hearing before the IDC were fairly extensive.[9] Under Policy Statement 7400.5C, which was in effect in 1975, no staff member having personal knowledge of the incident which is the subject matter of a hearing is permitted to serve on the IDC. Policy Statement, 7400.5C, Sec. 9(a). *See* 28 C.F.R. Sec. 541.14(b). The IDC is required to keep a record of the proceedings which documents the inmate's awareness of his rights, the IDC's findings, its decision, the specific evidence relied upon by the IDC, and an explanation of the reasons for imposing the sanction chosen. Policy Statement 7400.5C, Sec. 9(c)(4). *See* 28 C.F.R. Sec. 541.15(g). Moreover, prisoners are entitled to seek review of the IDC's decision. Initial review of an IDC decision is provided by the warden; an adverse decision by the warden may be appealed to the Regional Director, Bureau of Prisons. Finally, decisions of the Regional Director may be reviewed by the Assistant Director (General Counsel), Bureau of Prisons. Policy Statement 7400.5C, Sec. 10. *See* 28 C.F.R. Sec. 541.17.

[9] The plaintiffs have argued that in order to determine whether the third part of the *Butz* analysis is satisfied, a court should examine the procedure that was *actually* afforded them. In my view, the degree of procedural formality must be determined by examining the procedural safeguards which *should* have been afforded the plaintiffs; if, as the plaintiffs suggest, courts examined only the procedure actually afforded, then the decision to provide absolute immunity would depend entirely upon the degree which the IDC departed from traditional notions of procedural regularity. In other words, if procedural error was egregious, absolute immunity would not be available as a defense. Such an analysis would be akin to a qualified immunity analysis because the availability of absolute immunity would depend upon the degree to which the defendant's actions departed from accepted standards of conduct. *Cf. Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (defense of qualified immunity unavailable if actions clearly are at variance with established constitutional right).



An inmate charged with misconduct is entitled to notice of all charges against him at least 24 hours before his hearing. Policy Statement, 7400.5C, Sec. 9(c)(1). *See* 28 C.F.R. Sec. 541.15(a). He also is entitled to select a correctional staff member as an advocate for his position; the IDC may order the hearing continued to assure that the selected advocate has sufficient time to prepare for the hearing. Policy Statement, 7400.5C, Sec. 9(c)(2). *See* 28 C.F.R. Sec. 541.15(b). An inmate is permitted to call witnesses and to present documentary evidence on his behalf; the staff representative may question these witnesses or, if the right to a staff representative is waived, the inmate may submit written questions to be asked by the IDC.[10] Policy Statement 7400.5C, Sec. 9(c)(3). *See* 28 C.F.R. Sec. 541.15(c). If the IDC refuses to call a witness requested by the inmate, the reasons for the refusal must be determined in the record. Policy Statement 7400.5C, Sec. 9(c)(3). *See* 28 C.F.R. Sec. 541.15(c). The inmate is entitled to be present during all phases of the hearing, except during the deliberations of the IDC. Policy Statement 7400.5C, Sec. 9(c)(5). *See* 28 C.F.R. Sec. 541.15(c).

The proceedings before the IDC are adversarial in nature and are sufficiently formal to assure that any constitutional error will either be corrected in the course of the proceeding, or avoided entirely. Inmates are represented by advocates, and are permitted to present evidence in their defense. The IDC is required to engage in principled decision making, to make de-

[10] This right to call witnesses is not unlimited; the IDC may refuse to call a witness if the testimony would be cumulative or if the presence of the witness would implicate security considerations. Policy Statement 7500.5C, Sec. 9(c)(3). In any event, inmates are not permitted to conduct any examinations of witnesses.

tailed findings of fact, and to explain the basis for its decision in writing. At least two of the members of the IDC must be senior officials holding a position equivalent to a department head position; thus, the IDC's decision is unlikely to be a result of intimidating influences. Finally, any decision is subject to several levels of appellate review; the efficiency of the review is demonstrated by the decision to modify, and, ultimately, to reverse the IDC's decision in this case. I believe that IDC proceedings are sufficiently formal to satisfy the third prong of the *Butz* test and to warrant the extension of absolute immunity to IDC members.

In sum, I believe that the IDC members act in a quasi-judicial fashion, that a substantial risk of retaliatory litigation exists, and that the procedural rules governing the conduct of disciplinary proceedings are sufficient to assure that constitutional error will not go uncorrected; consequently, I would hold that the appellants, all members of the IDC, are entitled to absolute immunity. *Butz* v. *Economou*, 438 U.S. at 511-512, 98 S.Ct. at 2913-2914.



**APPENDIX B**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

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Cause No. TH 75-47-C

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DAVID SAXNER, ET AL

*vs.*

CHARLES BENSON, ET AL

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**ORDER**

This matter is before the Court upon motion of the defendants, M. Marcadis, T.P. Lockett, and T.G. Cleavenger (the three Institutional Disciplinary Committee members (hereinafter "IDC")) for a judgment notwithstanding the verdict or in the alternative a motion for a new trial pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure.

On April 27, 1981, the jury returned verdicts for the plaintiffs, David Saxner and Alfred Cain, Jr. against the "IDC" members named above for violations of plaintiffs' Fifth Amendment rights to due process. The verdicts were based upon allegations that the plaintiffs were subjected to disciplinary proceedings in front of the "IDC" which did not meet the requirements of due process. (See, Court [*sic*] Three as to plaintiff Saxner, and Count Seven as to plaintiff Cain, of the Third Amended Complaint filed September 27, 1978). The plaintiffs were individually awarded compensatory damages in the sum of One Thousand Five Hundred Dollars ($1,500.00) from each of the three "IDC" member-defendants, which totaled Four Thousand Five Hundred Dollars ($4,500.00) to David Saxner and Four Thousand Five Hundred Dollars ($4,500.00) to Alfred Cain, Jr. The jury returned the other verdicts against the plaintiffs and for the various defendants. Judgment

was entered in accordance with the jury verdicts on April 28, 1981. The motion before the Court was filed May 7, 1981 and the same was timely filed.

Saxner and Cain alleged, and the facts adduced at trial support the jury verdict, that defendants Cleavinger, Marcadis, and Lockett, as members of the "IDC", subjected plaintiffs to inmate disciplinary proceedings inconsistent with procedural due process requirements. These requirements were initially set forth in *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

The due process requirements for inmates accused of major rules violations consist of a hearing which complies with the following procedures:

1. Twenty-four (24) hour advanced written notice of the claimed violations;

2. An opportunity for the inmate to call witnesses and present documentary evidence in appropriate cases;

3. A written statement of the evidence relied upon and the reasons for any disciplinary action taken.

4. That the person who accuses him shall also not sit in judgment;

5. That the decision must be fundamentally fair, and not arbitrary and capricious.

*See Wolff, supra* at 563-572; *Baxter* v. *Paligiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); *Chavis* v. *Rowe*, 643 F.2d 1281 (7th Cir. 1981); *Hayes* v. *Thompson* (Hayes II), 637 F.2d 483 (7th Cir. 1980); *Hayes* v. *Walker* (Hayes I), 555 F.2d 625 (7th Cir. 1977), *cert. denied*, 434 U.S. 959, 98 S.Ct. 491, 54 L.ED.2d 320 (1977); *Shango* v. *Lurich*, 521 F. Supp. 1196 (N.D. Ill. 1981). These procedures were incorporated and in substantial effect during all times relevant to this action pursuant to Bureau of Prisons Policy Statement No. 7400.5C, paragraph 9(c), (October 4, 1974) entitled "Inmate Discipline." (See plaintiff's exhibit 7, pp 10-12). The Court instructed on the due process guarantees in Final Instruction Number 12.



At trial, the evidence indicated that Mr. Saxner and Mr. Cain received incident reports on February 15, 1979 charging them individually with "encouraging others to refuse to work." The plaintiffs appeared before the "IDC" on February 21, 1975. The committee consisted of defendants Cleavinger, Marcadis, and Lockett. During the hearing on the work stoppage charge, plaintiffs faced additional charges to which they did not receive advance notice. Plaintiff Saxner was charged at the hearing on February twenty-first and found responsible for unauthorized use of the mail and possession of contraband. Plaintiff Cain was charged and found responsible without receipt of advanced notice for possession of contraband.

The failure to give advance notice of these charges commenced the snowball of procedural due process deficiencies in the February twenty-first hearing. In addition to the lack of written notice, the inmates failed to have an opportunity to call witnesses and prepare evidence in defense of the charge. There was evidence in the record for the jury to likewise find due process deficiencies in the hearing on the work stoppage charge to which advance written notice had been given.

The right to call witnesses in the context of this case case has been noted as a "limited right." *Baxter*, 425 U.S. at 321. The Seventh Circuit initially addressed this issue in Hayes I indicating that to meet procedural due process guarantees in prison disciplinary hearings required: (1) "some support" for the denial of a request for witnesses appearing in the record and (2) the committee stating the "essential facts" upon which it based its decision. *Hayes*, 555 F.2d at 630, 633. The evidence presented to the jury sufficiently supports a basis for the jury verdict finding procedural due process violations in the February twenty-first "IDC" hearing.

This Court is well aware of the Supreme Court's admonition that the judiciary "should not be too ready to exercise oversight and put aside the judgment of prison administrators," especialy since "the operation of a correctional institution is at best an extraordinarily difficult undertaking." *Wolff*, 418 U.S. at 566, 94 S.Ct. at 2980. However, given the relatively recent *Wolff* requirements at the time of the hearing in question, as incorporated through the Bureau of Prisons policy, the individual "IDC" members failed to meet bare due process guarantees despite broad discretionary latitude. As to Saxner and Benson, neither had an opportunity to prepare or properly respond to charges they had not received notice to nor was there a proper showing of the compelling reasons for not calling witnesses to any of the charges.

For the violations of due process in the "IDC" hearing on February twenty-first (See Final Instructions 11, 12, 13 and 14) the jury awarded damages totaling Four Thousand Five Hundred Dollars ($4,500.00) to each plaintiff. A good faith instruction was given (See Final Instruction 31). Instruction numbers 33 and 34 explained in part the awarding of damages. Specifically, instruction number 34 allowed actual or compensable damages for a due process violation only upon a finding of actual physical or mental injury. The jury had sufficient evidence and found that the plaintiffs suffered actual injury from denial of due process rights as indicated in the answer to the interrogatories submitted to the jury along with the verdict forms.

The defendants argue that there cannot be a recovery for actual or compensable damages on the due process violations since there allegedly was no jury finding of physical or mental injury suffered by plaintiffs due to the answers to the special interrogatory forms reflecting no other violations of plaintiffs' constitutional rights. The special interrogatory forms did not set out



due process violation particulars for the jury to answer through their finding a Fifth Amendment violation in the "IDC" hearing. (The defendants did not propose additional particulars to the verdict forms. *See*, *Furtado* v. *Bishop*, 604 F.2d 80 (1st Cir. 1979)). More than one due process violation is possible. Did the jury find that the due process violations applied to the work stoppage charges as well as the other charges? The answer to this question does not require a new trial or setting aside the damage finding.

Plaintiffs Saxner and Cain asserted (see Counts 3 and 7) and established at trial, injury including mental and emotional distress resulting from and directly attributable to denial of due process rights to which the Supreme Court has held that plaintiffs may recover compensable damages. *Carey* v. *Piphus*, 435 U.S. 247, 263-264, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978). *See Chavis*, *supra*; *Hayes* v. *Thompson*, 637 F.2d 483, 494 (7th Cir. 1980) (Hayes II) (Swygert, J. dissenting); *Shango*, *supra*. Both plaintiffs testified to their emotions of mental pain, anguish, and frustration which flowed from the patent unfairness of the hearings and the fear that such unfair treatment would continue in the future in their administrative review and appeals, at their parole hearings, and in their day to day existence in the segregation units unrelated to the issue of the length (35 days) of time served in segregation.

This Court is not inclined to award compensatory damages for a mere general allegation of mental distress. *See Perez* v. *Rodriguez Bou*, 575 F.2d 21, 25 (1st Cir. 1978). The defendants are arguing that nominal damages are, at best, what plaintiffs are entitled to. Nominal damages are proper upon a showing of a denial of due process without proof of actual damage. *Carey* v. *Piphus*, 435 U.S. 247 (1978). Injury cannot be presumed from a denial of due process, 435 U.S. at 258. The Court is convinced the evidence at trial did not re-

quire the jury to make such an assumption in assessing its compensatory damages and that the plaintiffs proved the link between the due process violations and the actual injury consequences. *See McGhee* v. *Draper*, 639 F.2d 639, 645 (10th Cir. 1981).

Emotions are intangible but they are none the less perceptible. The emotional distress in this case was aggravated by the circumstances of the "IDC" hearing. The hurt done to feelings and to expectations of plaintiffs by an invasion of constitutional rights is no less real and no less compensable than the cost of repairing broken or damaged property in other cases. *See generally Kincaid* v. *Rusk*, Slip Op. No. 78-1822 decided February 10, 1982 (7th Cir. 1982); *Buise* v. *Hudkins*, 584 F.2d 223 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979). Even in a prison "IDC" hearing, the "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U.S. at 558, 94 S.Ct. at 2976. Wounded psyche and soul are to be salved by damages, when actually proven, as much as payment for property damage replacement or repair.

The difficulty of fixing a compensatory dollar amount is well-known. This axiom does not require nominal damages, however. *See Buise, supra; Mack* v. *Johnson*, 430 F. Supp. 1139, 1150-1151 (E.D. Pa. 1977), *see also, Brule* v. *Southworth*, 611 F.2d 406, 411 (1st. Cir. 1979). The Second Circuit has upheld a jury verdict ($1,000.00) as not being excessive on facts similar to the ones at bar. *United States ex. rel. Larkins* v. *Oswald*, 510 F.2d 583 (2nd Cir. 1975). The Seventh Circuit has likewise upheld a jury award of more than nominal damages for constitutional deprivations of due process perpetrated by members of a sheriffs department. *Konczak* v. *Tyrrell*, 603 F.2d 13 (7th Cir. 1979).

The Court is not persuaded by the claim that plaintiffs' [*sic*] may not recover substantial damages despite



due process violations where plaintiffs may have been disciplined in a similar manner had they been afforded their due process guarantees. *Carey, supra*, at 266-67. The jury as fact-finder, had this evidence as well as other facts for their consideration. The introduction of plaintiff Saxner's wife and child during closing argument did not have a prejudicial impact upon any jury determination of damages to justify reduction of damages or to justify a new trial given the Court's instruction at the time.

Upon this review, a motion for judgment notwithstanding the verdict "should be denied where the evidence, along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion is such that reasonable men [or women] in a fair and impartial exercise of their judgment may reach different conclusions." *Clemons* v. *Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746, 748 (7th Cir. 1979); *Hohmann* v. *Packard Instrument Co.*, 471 F.2d 815, 819 (7th Cir. 1973). Making all reasonable inferences in the light most favorable to the jury's verdict, the Court believes the evidence at trial established sufficient evidence of due process violations resulting in actual injury compensable in the sums found by the jury.

Defendants further move for a new trial. A verdict may be set aside and a new trial granted when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of sound discretion the trial judge thinks this action is necessary to prevent a miscarriage of justice. *See United States for use of Weyerhaeuser Company* v. *Bucon Construction Company*, 430 F.2d 420, 14 F.R. Serv. 2d 278 (5th Cir. 1970); 6A *Moore's Federal Practice*, ¶ 59.08[5], pp. 59-154 through 155 (1979). In this case, the Court concludes that the verdict is not against the clear weight of the evidence. Accordingly, no new trial will be ordered.

By reason of the foregoing, the Court concludes:

(1) defendants' motion for judgment notwithstanding the verdict is DENIED;

(2) Defendants' alternative motion for a new trial is DENIED.

IT IS SO ORDERED.

Dated at Evansville, Indiana this 14th day of April, 1982.

/s/ Gene E. Brooks

JUDGE GENE E. BROOKS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA



**APPENDIX C**

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Nos. 82-1799 and 82-1816

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DAVID SAXNER AND ALFRED CAIN, JR.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

*vs.*

CHARLES BENSON, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, TERRE HAUTE DIVISION

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[Feb. 13, 1984]

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BEFORE: HARLINGTON WOOD, JR., *Circuit Judge*
RICHARD D. CUDAHY, *Circuit Judge*
ANTHONY J. CELEBREZZE, *Senior Circuit Judge**

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with the parties to bear their own costs on appeal, in accordance with the opinion of this Court filed this date.

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* The Honorable Anthony J. Celebrezze, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Nos. 82-1799 and 82-1816

---

DAVID SAXNER AND ALFRED CAIN, JR.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

*vs.*

CHARLES BENSON, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA,
TERRE HAUTE DIVISION

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[June 8, 1984]

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**ORDER**

BEFORE: HARLINGTON WOOD, JR., *Circuit Judge*
RICHARD D. CUDAHY, *Circuit Judge*
ANTHONY J. CELEBREZZE, *Senior Circuit Judge**

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for the defendants-appellants, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*.** A majority of the judges on the original panel have voted to deny the petition for rehearing.*** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Anthony J. Celebrezze, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

** Judges Pell, Eschbach, Posner, and Coffey voted to grant a rehearing *en banc*.

*** Judge Celebrezze voted to grant the petition for rehearing. He did not participate in the vote on rehearing *en banc*.



**APPENDIX E**

28 C.F.R. 541.14—541.19 provides in pertinent part:

**§ 541.14 Incident report and investigation.**

(a) *Incident Report.* The Bureau of Prisons encourages informal resolution (requiring consent of both parties) of incidents involving violations of Bureau regulations. However, when staff witnesses or has a reasonable belief that a violaton of Bureau regulations has been committed by an inmate, and when staff considers informal resolution of the incident inappropriate or unsuccessful, staff shall prepare an Incident Report and promptly forward it to the appropriate correctional supervisor. Except for prohibited acts in the Greatest Severity Category, the correctional supervisor may informally dispose of the Incident Report or forward the Incident Report for investigtion consistent with this section. The correctional supervisor shall expunge the inmate's file of the Incident Report if informal resolution is accomplished. Only the IDC may make a final disposition on a prohibited act in the Greatest Severity Category.

(b) *Investigation.* Staff shall conduct the investigation promptly unless circumstances beyond the control of the investigator intervene. The investigating officer should be an employee of supervisory level and may not be the employee reporting the incident, or one who was involved in the incident, in question.

(1) When it appears likely that the incident may be the subject of criminal prosecution, the investigating officer shall suspend the investigation, and staff may not question the inmate until the Federal Bureau of Investigation or other investigative agency interviews have been completed or until the agency responsible for the criminal investigation advises that staff questioning may occur.

(2) The inmate may receive a copy of the Incident Report prior to being seen by the investigating agency. The investigating officer (Bureau of

Prisons) shall give the inmate a copy of the Incident Report at the beginning of the investigation, unless there is good cause for delivery at a later date, such as absence of the inmate from the institution or a medical condition which argues against delivery. If the investigation is delayed for any reason, any employee may deliver the charge(s) to the inmate. The staff member shall note the date and time the inmate received a copy of the Incident Report. The investigator shall also read the charge(s) to the inmate and ask for the inmate's statement concerning the incident unless it appears likely that the incident may be the subject of criminal prosecution. The investigator shall advise the inmate of the right to remain silent at all stages of the disciplinary process but that the inmate's silence may be used to draw an adverse inference against the inmate at any stage of the institutional disciplinary process. The investigator shall also inform the inmate that the inmate's silence alone may not be used to support a finding that the inmate has committed a prohibited act. The investigator shall then thoroughly investigate the incident. The investigator shall record all steps and actions taken on the Incident Report and forward all relevant material to the staff holding the initial hearing. The inmate does not receive a copy of the investigation. However, if the case is ultimately forwarded to the Institution Discipline Committee, the Committee shall give a copy of the investigation and other relevant materials to the inmate's staff representative for use in presentation on the inmate's behalf.

[47 FR 35926, Aug. 17, 1982; 47 FR 39676, Sept. 9, 1982]

**§ 541.15 Initial hearing.**

The Warden shall delegate to one or more institution staff members the authority and duty to hold an initial hearing upon completion of the in-



vestigation. The Warden shall authorize these staff members to impose minor sanctions (G through P) for violation of prohibited act(s). In order to insure impartiality, the appropriate staff member(s) (hereinafter usually referred to as the Unit Discipline Committee (UDC)) may not be the reporting or investigating officer or a witness to the incident. However, a staff member witnessing an incident may serve on the UDC where virtually every staff member in the institution witnesses the incident in whole or in part. If the UDC finds at the initial hearing that an inmate has committed a prohibited act, the UDC may impose minor dispositions and sanctions. When an alleged violation of Bureau rules is serious and warrants consideration for other than minor sanctions, the UDC shall refer the charges to the Institution Discipline Committee for further hearings. The UDC must refer all greatest category charges to the IDC. The following minimum standards apply to initial hearings in all institutions.

(a) Staff shall give each inmate charged with violating a Bureau rule a written copy of the charge(s) against the inmate within 24 hours of the time staff became aware of the inmate's involvement in the incident.

(b) Each inmate so charged is entitled to an initial hearing before the UDC, ordinarily held within two work days (excluding day of notice, weekends and holidays) of the time staff became aware of the inmate's involvement in the incident to consider the charge(s) brought against the inmate.

(c) The inmate is entitled to be present at the initial hearing except during deliberations of the decision maker(s) or when institutional security would be joepardized by the inmate's presence. The UDC shall clearly document in the record of the hearing reasons for excluding an inmate from the hearing. An inmate may waive the right to be present at this hearing, provided that the waiver is

documented by staff and reviewed by the UDC. A waiver may be in writing, signed by the inmate, or if the inmate refuses to sign a waiver, it may be shown by a memorandum signed by staff and witnessed by a second staff member indicating the inmate's refusal to appear at the hearing. The UDC may conduct a hearing in the absence of an inmate when the inmate waives the right to appear. When an inmate escapes or is otherwise absent from custody, the UDC shall conduct a hearing in the inmate's absence at the institution in which the inmate was last confined.

(d) The inmate is entitled to make a statement and to present documentary evidence in the inmate's own behalf.

(e) The Unit Discipline Committee may informally resolve any High, Moderate, or Low Moderate charge. The UDC shall expunge the inmate's file of the Incident Report if informal resolution is accomplished.

(f) The Unit Discipline Committee shall consider all evidence presented at the hearing and shall make a decision in accordance with the greater weight of the evidence and one which is supported by substantial evidence manifested in the record of the proceedings. The UDC shall take one of the following actions:

(1) Find that the inmate committed the prohibited act charged and/or a similar prohibited act if reflected in the Incident Report;

(2) Find that the inmate did not commit the prohibited act charged or a similar prohibited act if reflected in the Incident Report; or

(3) Refer the case to the IDC for further hearing.

The UDC shall give the inmate a written copy of the decision and disposition by the close of business the next work day. Any action taken as a minor disposition is reviewable under the Administrative Remedy Procedure (see Part 542 of this chapter).



(g) The UDC shall prepare a record of its proceedings which need not be verbatim. A record of the hearing and supporting documents are kept in the inmate's file.

(h) When the alleged violation of Bureau rules is serious and warrants consideration for other than minor sanctions (G through P), the UDC shall refer the charge(s) without indication of findings as to commission of the alleged violation to the Institution Discipline Committee (IDC) for hearing and disposition. The UDC shall forward copies of all relevant documents to the chairman of the IDC with a brief statement of reasons for the referral along with any recommendations for appropriate disposition if the IDC finds the inmate has committed the act charged and/or a similar prohibited act. The inmate whose charge is being referred to the Institution Discipline Committee may be retained in administrative detention or other restricted status, but the UDC may not impose a final disposition if the matter is being referred to the IDC.

(i) When charges are to be referred to the Institution Discipline Committee, the UDC shall advise the inmate of the rights afforded at a hearing before the IDC. The UDC shall ask the inmate to indicate a choice of staff representative, if any, and the names of any witnesses the inmate wishes to be called to testify at the hearing and what testimony they are expected to provide. The UDC shall advise the inmate that the inmate may waive the right to be present at the IDC hearing, but still elect to have witnesses and/or a staff representative appear in the inmate's behalf at this hearing.

(j) When the Unit Discipline Committee holds a full hearing and determines that the inmate did not commit a prohibited act of High, Moderate or Low Moderate Severity, the UDC shall expunge the inmate's file of the Incident Report and related documents. The UDC must refer to the Institution Dis-

cipline Committee all incidents involving prohibited acts of Greatest Severity.

(k) The UDC may extend time limits imposed in this section for a good cause shown by the inmate or staff and documented in the record of the hearing.

[47 FR 35926, Aug. 17, 1982; 47 FR 39676, Sept. 9, 1982]

**§ 541.16 Establishment and functioning of Institution Discipline Committee.**

(a) The Warden shall establish a single Institution Discipline Committee. In the event of a serious disturbance or other emergency, or if an inmate commits an offense in the presence of the IDC, the Warden may establish more than one Institution Discipline Committee with approval of the appropriate Regional Director.

(b) The Warden may appoint as many members to the Institution Discipline Committee as are appropriate. At least three members, including the chairman, shall be present at any hearing to constitute a quorum. The chairman and at least one member present at the hearing must be of the department head level or higher. The third member and additional members of the Committee need not be of department head level. For the purpose of this section, "department head" includes acting department head. In order to insure impartiality, no member of the IDC may be the reporting officer, investigating officer, or UDC member or a witness to the incident, or play any significant part in having the charge(s) referred to the IDC. However, a staff member witnessing an incident may sit as a member of the IDC where virtually every staff member in the institution witnessed the incident in whole or in part.

(c) The Institution Discipline Committeee shall conduct hearings, make findings, and impose appropriate sanctions for incidents of inmate misconduct referred to it for disposition following the hearing required by § 541.15 before the UDC. The IDC may not hear any case or impose any sanctions in a case not heard and referred by the UDC. Only the Institution Discipline Committee shall have the authority to impose or suspend sanctions A through F. This Committee shall conduct reviews of inmates placed in disciplinary segregation in accordance with the requirements of § 541.20.



**§ 541.17 Procedures in Institution Discipline Committee hearings.**

The Institution Discipline Committee shall proceed as follows:

(a) The Warden shall give an inmate advance written notice of the charge(s) against the inmate no less than 24 hours before the inmate's appearance before the Institution Discipline Committee unless the inmate is to be released from custody within that time. An inmate may waive in writing the 24-hour notice requirement.

(b) The Warden shall provide an inmate the service of a full time staff member to represent the inmate at the hearing before the Institution Discipline Committee should the inmate so desire. The warden, the members of the IDC, the reporting officer, investigating officer, a witness to the incident, and UDC members involved in the case may not act as staff repesentative. The Warden may exclude other staff from acting as staff representative in a particular case when there is a potential conflict in roles. The staff representative shall be available to assist the inmate if the inmate desires by speaking to witnesses and by presenting favorable evidence to the IDC on the merits of the charge(s) or in extenuation or mitigation of the charge(s). The chairman shall arrange for the presence of the staff representative selected by the inmate. If the staff member selected declines or is unavailable because of absence from the institution, the inmate has the option of selecting another

representative, or in the case of an absent staff member of waiting a reasonable period for the staff member's return, or of proceeding without a staff representative. When several staff members decline this role, the Warden shall promptly appoint a staff representative to assist the inmate. The IDC shall afford a staff representative adequate time to speak with the inmate and interview requested witnesses where appropriate. While it is expected that a staff member will have had ample time to prepare prior to the hearing, delays in the hearing to allow for adequate preparation may be ordered by the chairman of the Institution Discipline Committee.

When it apears that the inmate is not able to properly make a presentation on his own behalf (for example, an illiterate inmate), the Warden shall appoint a staff representative for that inmate, even if one is not requested.

(c) The inmate is entitled to make a statement and to present documentary evidence in the inmate's own behalf. An inmate has the right to submit names of requested witnesses and have them called to testify and to present documents in the inmate's behalf, provided the calling of witnesses or the disclosure of documentary evidence does not jeopardize or threaten institutional or an individual's security. The chairman shall call those witnesses who have information directly relevant to the charge(s) and who are reasonably available. This may include witnesses from outside of the institution. The inmate charged may be excluded during the appearance of the outside witness. The appearance of the outside witness should be in an area of the institution in which outside visitors are usually allowed. The chairman need not call repetitive witnesses. The reporting officer and other adverse witnesses need not be called if their knowledge of the incident is adequately summarized in the Incident Report and other investigative mate-



rials supplied to the IDC. The chairman shall request submission of written statements from unavailable witnesses when necessary for an appreciation of the circumstances surrounding the charge(s). The chairman shall document reasons for declining to call requested witnesses in the IDC report. The inmates's staff representative, or when the inmate waives staff representation members of the Committee, shall question witnesses requested by the inmate who are called before the IDC. The inmate who has waived staff representation may submit questions for requested witnesses in writing to the Committee. The inmate may not question any witness at the hearing.

(d) An inmate has the right to be present throughout the Institution Discipline Committee hearing except during deliberations of the Committee or when institutional security would be jeopardized. The chairman must document in the record the reason(s) for excluding an inmate from the hearing. An inmate may waive the right to be present at the hearing, provided that the waiver is documented by staff and reviewed by the IDC. A waiver may be in writing, signed by the inmate, or if the inmate refuses to sign a waiver, it may be shown by a memorandum signed by staff and witnessed by a second staff member indicating the inmate's refusal to appear at the hearing. The Committee may conduct a hearing in the absence of an inmate when the inmate waives the right to appear. When an inmate escapes or is otherwise absent from custody, the Institution Discipline Committee shall conduct a hearing in the inmate's absence at the institution in which the inmate was last confined. When an inmate who has had any sanctions imposed by the IDC while absent from custody returns to custody, the Warden shall have the charges reheard before the Institution Discipline Committee at the institution to which the inmate is designated after return to custody, and fol-

lowing appearance before the Unit Discipline Committee at that institution. The UDC shall ensure that the inmate has all rights required for appearance at the Institution Discipline Committee, including delivery of charge(s), advisement of the right to remain silent and other rights to be exercised at the IDC. All the applicable procedural requirements of Institution Discipline Committee hearings apply to this rehearing, except that written statements of witnesses not readily available may be liberally used instead of in-person witnesses. The IDC upon rehearing may dismiss the charge(s), or may modify but may not increase the sanctions previously imposed in the inmate's absence.

(e) The IDC may postpone or, at any time prior to making a decision as to whether or not a prohibited act was committed, may continue the hearing until a later date whenever further investigation or more evidence is needed. A postponement or continuance must be for good cause (determined by the IDC chairman) shown by the inmate or staff and should be documented in the record of the hearing.

(f) The IDC shall consider all evidence presented at the hearing and shall make a decision in accordance with the greater weight of the evidence and one which is supported by substantial evidence manifested in the record of the proceedings. The Committee shall find that the inmate either:

(1) Committed the prohibited act charged and/or a similar prohibited act if reflected in the Incident Report, or

(2) Did not commit the prohibited act charged or a similar prohibited act if reflected in the Incident Report.

When a disciplinary committee decision is based on confidential informant information, the UDC or IDC shall document, ordinarily in the committee report, its finding as to the reliability of each confi-



dential informant relied on *and the factual basis for that finding.* When it appears that this documentation in the committee report would reveal the confidential informant's identity, the finding as to the reliability of each confidential informant relied on and the factual basis for that finding shall be made part of the hearing record in a separate report, prepared by the IDC chairman, not available to the inmate.

(g) The Institution Discipline Committee shall prpeare a record of its proceedings which need not be verbatim. This record mut be sufficient to document the advisement of inmate rights, the Committee's findings, the Committee's decision and the specific evidence relied on by the Committee, and must include a brief statement of the reasons for the sanctions imposed. The evidence relied upon, the decision, and the reasons for the actions taken must be set out in specific terms unless doing so would jeopardize institutional security. The IDC shall give the inmate a written copy of the decision and disposition.

(h) A record of the hearing and supporting documents are to be kept in the inmate central file.

(i) The Institution Discipline Committee shall expunge an inmate's file of the Incident Report and related documents whenever the Committee finds the inmate did not commit a prohibited act. The requirement for expunging the inmate's file does not preclude maintaining for research purposes copies of disciplinary actions resulting in "not guilty" findings in a master file separate from the inmate's institution file. However, institution staff may not use or allow the usage of the contents of this master file in a manner which would adversely affect the inmate. Likewise, the expungement requirement does not require the destruction of medical reports or other reports relating to a particular inmate which must be maintained to document medical or other treatment given in a special housing

unit. If an inmate's conduct during one continuous incident may constitute more than one prohibited act, and if the incident is reported in a single Incident Report, and if the IDC finds the inmate has not committed every prohibited act charged, then the IDC shall record its findings clearly and shall mark out on the Incident Report the incident and code references to charges which were not proved. Institution staff may not use the existence of charged but unproved misconduct against the inmate.

[47 FR 35926, Aug. 17, 1982; 47 FR 39676, Sept. 9, 1982]

**§ 541.18 Dispositions of the Institution Discipline Committee.**

The Institution Discipline Committee has available a broad range of sanctions and dispositions when it has completed a hearing. The Institution Discipline Committee may do any of the following:

(a) Dismiss any charge(s) before it upon a finding that the inmate did not commit the prohibited act(s). The IDC shall order the record of charge(s) expunged upon such finding.

(b) Impose sanctions A through P as provided in § 541.13.

(c) Suspend the execution of a sanction it imposes as provided in § 541.13.

**§ 541.19 Appeals from Unit Discipline Committee on Institution Discipline Committee actions.**

At the time the Unit Discipline Committee or Institution Discipline Committee gives an inmate notice of its decision, they shall also advise the inmate that the inmate may appeal the decision under Administrative Remedy Procedures (see Part 542 of this chapter). On appeals, the Warden, Regional Director, or General Counsel may approve, modify, reverse, or send back with directions any disciplinary action of the unit discipline committee or Institution Discipline Committee but may not increase the sanctions imposed. On appeals, the Warden, Regional Director, or General Counsel shall consider:



(a) Whether the Unit Discipline Committee or the Institution Discipline Committee substantially complied with the regulations on inmate discipline;

(b) Whether the Unit Discipline Committee or Institution Discipline Committee based its decision on substantial evidence; and

(c) Whether an appropriate sancton was imposed according to the severity level of the Prohibited Act.

Bureau of Prisons Policy Statement 7400.5C, issued Oct. 4, 1974, provided in pertinent part:

4. *ACTION*. A single Institution Discipline Committee will be established in each Bureau of Prisons Institution. The Committee will be composed of at least three (3) members, of whom two (2) will be of department head level or above; the Chairman will be of the level of department head or above. This requirement as to the level of members will not apply to Community Treatment Centers or Camps.

The Chief Executive Officer of each institution will delegate to the Institution Discipline Committee the authority to order an inmate placed or retained in disciplinary segregation, to order the withholding or forfeiture of good time, and to order an inmate transferred for disciplinary reasons. The authority to impose sanctions other than disciplinary segregation, withholding or forfeiture of good time and transfer for disciplinary reasons will be lodged

7. *INCIDENT REPORT AND INVESTIGATION*.

(a) *Incident Report:* Informal resolution of incidents involving violations of institution rules or regulations is encouraged. However, where an em-

ployee witnesses or has a reasonable belief that a violation of institution rules or regulations has been committed by an inmate, and where the employee deems that informal resolution of the incident is unwarranted, the employee shall prepare an incident report and forward it to the appropriate correctional supervisor. The appropriate correctional supervisor may informally dispose of the incident report or forward the incident report for further disposition consistent with the policy statement.

The reporting employee should complete Part 1 of the incident report immediately. The incident is to be one of the Prohibited Acts listed in paragraph 6(f) of this policy statement. The entire language of the Prohibited Act(s) does not have to be copied. Only the relevant portion need be used. For example, "Destroying Government Property, Code No. 152," "Possessing narcotics, Code No. 801" would be acceptable listings for appropriate charges.

The description of the incident should contain the details of the activity which is being reported. All facts about the incident which are known by the employee should be recorded. If there is anything unusual about the inmate's behavior, this should be noted. The reporting employee should also list any staff or inmate witnesses to the incident, and the disposition of any physical evidence (weapons, property, and etc.) which the employee may have personally handled. The reporting employee will sign the report and indicate his title in the appropriate blocks. The incident report should then be forwarded to the appropriate correctional supervisor for disposition.

(b) *Investigation:* The investigation should be conducted within 24 hours of appointment of the investigator, unless circumstances beyond the control of the investigator intervene. The investigating officer should ordinarily be an employee of supervisory level and may not be the employee reporting the particular incident in question. Where it appears likely that the incident may be the subject of a criminal prosecution, investigation should be suspended and the inmate should not be questioned until the FBI interviews have been completed. (See Policy Statement 2200.1.)



Ordinarily, an inmate will be given a copy of the incident report by the investigating officer at the beginning of the investigation. If the investigation is delayed for any reason, any employee may deliver the charges to the inmate. The date and time the inmate receives a copy of the Incident Report will be noted. This should be done within eight (8) hours from the time the investigator received his assignment, unless there are exceptional circumstances which prevent it. The investigator should also read the charges to the inmate and obtain his statement concerning the incident, except as provided above. Comment about the inmate's attitude may be included here.

The investigator should then thoroughly investigate the incident. He should talk to witnesses, and summarize their statements. The disposition of evidence should be recorded. Often, he will want to talk to the reporting employee to obtain his report first hand and to clarify any questions the investigator may have. All steps and actions taken should be recorded on the incident report.

Under Comments and Conclusions, the investigator may include his comments on the inmate's prior record and behavior, his analysis of any conflicts between witnesses, and his conclusions of what in fact happened. The inmate does not receive a copy of the investigation. However, should the case ultimately be forwarded to the Instituion Discipline Committee, the investigation should be given to the inmate's staff representative for use in presentation on the inmate's behalf.

8. *MINOR DISPOSITIONS.* The Chief Executive Officer of each institution shall delegate to such

persons he selects the authority tc impose minor dispositions and sanctions for violations of institution rules or regulations. Where the institution has a unit management system, the authority to impose minor dispositions and sanctions shall be delegated to staff members of an inmate's unit. Minor dispositions and sanctions are those actions imposed for violation of institution rules or regulations other than segregation, withholding or forfeiture of good time, and transfer for disciplinary reasons. While the process by which minor dispositions are imposed is left to the discretion of the Chief Executive Officer of each institution, the following minimum standards will apply throughout the Bureau of Persons:

(a) Each inmate charged with violating an institution rule or regulation shall be given a written copy of the charge or charges against him within 24 hours of the infraction.

(b) Each inmate so charged will be entitled to a hearing held within 48 hours (excluding weekends and holidays) of the incident to consider the charge brought against him.

(c) The inmate will be entitled to be present at the hearing except during deliberations of the decision maker and where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record.

(d) The inmate will be afforded the opportunity to make a statement and present documentary evidence in his own behalf.

(e) the inmate will be given a written copy of the decision and disposition. Review of any action taken as a minor disposition will be pursuant to the Administrative Remedy Procedure, Policy Statement 2001.6A.

(f) Where an alleged violation of institution rules or regulations warrants consideration for other than minor sanction, the charge may be referred to



the Institution Discipline Committee for hearing and disposition. Copies of all relevant documents should be forwarded to the Chairman of the Institution Discipline Committee with a brief statement of reasons for the referral along with any recommendations for appropriate disposition should the inmate be found to have committed the act charged.

(g) When charges are to be referred to the Institution Discipline Committee, the inmate shall be advised of the rights afforded at a hearing before the institution Discipline Committee. He shall be asked to indicate his choice of staff representative and the names of any witnesses he wishes to be called to testify on his behalf at the hearing. (A sample form that may be used for this purpose is attached to this policy statement. Time limits imposed in this section may be extended for good cause.)

(h) Where the person or persons delegated the authority to impose minor dispositions determines that the inmate is innocent of committing any prohibited act, the inmate's file shall be expunged of the incident report lodged against him.

9. *INSTITUTION DISCIPLINE COMMITTEE.*

(a) *Composition:* The Chief Executive Officer may appoint any members to the Institution Discipline Committee as he deems appropriate. No fewer than three members, including the Chairman, must be present at any hearing to constitute a quorum. The Chairman and no less than one member present at the hearing will be of the department head level or higher. The third member of the committee need not be of department head level. For the purposes of this section, "department head" includes acting department head. This requirement as to the level of staff members and Chairman will not apply to Community Treatment Centers or Camps. In order to insure impartiality, a staff member may not sit as a member of the

Institution Discipline Committee if he reported or investigated the incident of rules infraction being considered. Ordinarily a staff member witnessing an incident under consideration should not sit as a member of the Institution Discipline Committee. However, a staff member witnessing an incident may sit as a member of the Institution Discipline Committee where the incident is so widely witnessed that virtually every staff member has witnessed it in whole or part. Likewise, a staff membr may not sit as a member of the Institution Discipline Committee if he played any significant part in having the charges referred to the Institution Discipline Committee for consideration. The Chief Executive Officer should appoint members to this Committee who are broadly representative of the primary areas of institutional administration and who are fully knowledgeable of the requirements of this policy statement and of the functions of Inmate Discipline.

(b) *Functions:* The Institution Discipline Committee shall conduct hearings, make findings, and may impose appropriate sanctions on incidents of inmate misconduct referred to it for disposition in accordance with the due process standards as listed below. While this Committee may impose any lesser sanctions available, only this Committee will have the authority to order: (1) an inmate placed in disciplinary segregation, (2) an inmate's good time withheld or forfeited, or (3) an inmate transferred to another institution for disciplinary reasons. This Committee will also conduct reviews of inmates placed in disciplinary segregation in accordance with requirements listed below.

(c) *Procedural Requirements:* An inmate may not be placed in disciplinary segregation, or have his good time withheld or forfeited, or be transferred to another institution for disciplinary reasons unless there has been a fact-finding hearing



before the Institution Discipline Committee in which the following procedures have been satisfied:

(1) An inmate will be given advance written notice of the charge(s) against him no less than 24 hours before his appearance before the Institution Discipline Committee. An inmate may waive in writing this 24 hour notice requirement.

(2) An inmate will be provided the service of a full-time staff member to represent him at the hearing before the Institution Discipline Committee should he so desire. The Chairman shall arrange for the presence of a selected staff representative. If the staff member selected declines or is unavailable because of absence from the institution, the inmate should be given the options of selecting another representative, or in the case of an absent staff member, of waiting a reasonable period for his return, or continuing the hearing without a staff representative. A staff representative should be given adequate time to speak with the inmate and interview requested witnesses where appropriate. While it is expected that a staff member will have had ample time to prepare prior to the hearing, delays in the hearing to allow for adequate preparation may be ordered by the Chairman of the Institution Discipline Committee.

(3) An inmate will be permitted to have witnesses called and to present documents in his behalf, provided the calling of witnesses or the disclosure of documentary evidence would not jeopardize or threaten institutional security. The Chairman will call those witnesses he deems reasonably available and necessary for an appreciation of the circumstances surrounding the charge. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements. Reasons for declining to call requested witnesses will be documented in the Committee's report. Witnesses requested by the inmate who are called should be questioned by his staff representa-

tive or where staff representation has been waived, by members of the Committee. Inmates who have waived the services of a staff representative may submit questions for requested witnesses in writing to the Committee.

(4) The Institution Discipline Committee will prepare a record of its proceedings which need not be verbatim. This record must be sufficient to document the advisement of inmate rights, the Committee's findings, the Committee's decision, the specific evidence relied on by the Committee, and a brief statement of the reasons for the sanctions imposed. The evidence relied upon for the decision and the reasons for the actions taken should be set out in specific terms unless doing so would jeopardize institutional security. (A sample form that may be used to advise an inmate of his rights at an Institution Discipline Committee hearing is attached to this policy statement.)

(5) An inmate will be permitted to be present throughout the Institution Discipline Committee hearing except during deliberations of the Committee and except where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record. A hearing may be conducted in the absence of an inmate where the inmate refuses to appear and he can not be brought to the hearing without the use of force. When an inmate escapes from custody, the Institution Discipline Committee will conduct a hearing in the inmate's absence at the institution from which the escape occurred. When an inmate who has had sanctions imposed (such as loss of good time) while absent from custody, returns to custody, he will be advised of his right to have the escape charge brought before the Institution Discipline Committee at the institution where he returned to custody. All the procedural requirements of Institution Discipline Committee hearings will apply to this rehearing except written



statements of witnesses not readily available may be liberally used instead of live witnesses. The Institution Discipline Committee, upon rehearing, may dismiss the charge, or may modify but may not increase the sanctions previously imposed in the inmate's absence.

(d) *Dispositions of the Institution Discipline Committee:* The Institution Discipline Committee shall have available a broad range of sanctions and dispositions. These dispositions and sanctions will include the following:

The Institution Discipline Committee may

(1) Dismiss any charge(s) before it where appropriate and shall order the record of charges expunged where the inmate has been determined innocent of the charge(s).

(2) Impose sanctions and dispositions available to the person or persons designated to impose minor dispositions.

(3) Direct that an inmate be placed or retained in disciplinary segregation pursuant to guidelines contained in this policy statement.

(4) Direct that an inmate's good time be withheld. Withholding of good time should be limited to misconduct or offenses; it should not be applied as a universal punishment to all persons in disciplinary segregation status. Withholding shall be limited to the good time creditable for the single month during which the violation occurs. (Some offenses, such as refusal to work at an assignment, may be recurring, and thus may permit consecutive withholding actions.) Withheld good time may be considered for restoration at any time.

(5) Direct that an inmate's goodtime be forfeited. The good time available for forfeiture is limited to an amount computed by multiplying the number of months served at the time of the offense for which forfeiture action is taken, by the applicable monthly rate specified in 18 United States Code, Section 4161 (less any previous forfeiture or

withholding outstanding), plus extra good time which may have been earned to the date of the offense. All or part of an inmate's accumulated good time may be forfeited. Authority to restore all types of forfeited and withheld good time is delegated to the Institution Discipline Committee of each institution. Forfeited good time may be considered for restoration at any time.

(6) Direct that an inmate be transferred to another institution for disciplinary reasons. Where a present or impending emergency requires immediate action, an inmate may be transferred prior to an Institution Discipline Committee hearing. However, a hearing before the Institution Discipline Committee at the receiving institution must be conducted as soon as practicable under the circumstances to consider the factual basis of the charge of misconduct and the reasons for the emergency transfer. Transfers for disciplinary reasons prior to a hearing before the Institution Discipline Committee are to be used only in emergency situations and only with the approval of the receiving Regional Director. However, when an inmate is transferred under these circumstances, the sending institution will forward copies of incident reports with completed investigation to the receiving institution for purposes of the hearing before the receiving institution's Institution Discipline Committee. All procedural requirements applicable to Institution Discipline Committee hearings contained in paragraph 9(c) of this policy statement will be utilized, except written statements of unavailable witnesses may be liberally accepted instead of live testimony.

(7) Suspend the execution of any sanction it imposes.

(e) *Criminal Prosecutions:* Where an inmate's misconduct may also be the subject of a criminal prosecution, it is not necessary to await the outcome of the criminal trial before taking disciplinary action, especially if there is reason to believe there



will be a long delay before the trial is held. An inmate under investigation of the FBI or other law enforcement officers for an offense committed in the institution may not be questioned about the charge until the FBI interviews are completed. An inmate who is the subject of criminal prosecution for instituional violations will not be transferred from the jurisdiction of the trial court without the consent of the appropriate United States Attorney or the Court in which the trial is pending.

10. *APPEALS FROM INSTITUTION DISCIPLINE COMMITTEE ACTIONS.* At the time the Institution Discipline Committee gives an inmate notice of its decision, the Committee will also advise the inmate that he may appeal the Committee's decision to the Chief Executive Officer. Appeals must be filed no later than thirty (30) days after notice of the decision. This time limit may be extended for good cause shown. An inmate wishing to appeal any disciplinary action imposed as a result of a hearing before the Institution Discipline Committee must use the procedures and forms provided for by Policy Statement 2001.6A (Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities). The Chief Executive Officer may approve, modify, or reverse any disciplinary action of the Institution Discipline Committee as he deems appropriate. This authority may not be delegated. The Chief Executive Officer may not increase the amount of forfeiture imposed.

An inmate may appeal an adverse decision of the Chief Executive Officer through the appeal procedures contained in Policy statement 2001.6A to the appropriate Regional Director. Appeals to the Regional Director from adverse decisions from the Chief Executive Officer must be filed no later than thirty (30) days from the date of the Chief Executive Officer's decision.

Additionally, appeals of adverse decision from the Regional Director may be made to the Assistant Director, General Counsel and Review within thirty (30) days of the decision from the Regional Director.

On appeal the following factors will be considered:

(a) Was there substantial compliance with the Policy Statement on Inmate Discipline?

(b) Was the decision of the Institution Discipline Committee based on substantial evidence?

(c) Under the circumstances, was the sanction imposed disproportionate to the offense?